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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

EUGENE RAFFIELD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner a commercial fisherman and owner of a fish processing plant in Gulf County, Florida, received a Federal permit to catch redfish (red drum) by the use of purse seine under the provisions of an emergency rule issued by the National Marine Fisheries Service on June 30, 1986, pursuant to the authority provided in §305(e)(1) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. §1885(e)(1)). Petitioner, pursuant to the Federal red drum permit and with a Federal observer aboard his vessel, took a large amount of red drum in the waters of the Exclusive Economic Zone of the United States off of the coast of Louisiana. The fish were landed in Louisiana and then trucked to Petitioner's fish processing plant in Port St. Joe, Florida. The Petitioner (and others) was then arrested and the fish were confiscated. The Petitioner was charged with violating FLA. STAT. §370.08(3), which makes it illegal to take food fish within or without the waters of Florida with the use of a purse seine and seeks to prohibit the possession of food fish so taken. The question presented is that, under the circumstances, was the Petitioner deprived of rights protected by the:

1. Supremacy Clause of Article VI of the United States Constitution in that the Petitioner was arrested under the authority of State Law for activities which were expressly legal pursuant to Federal Statutory Law, Rules, and Regulations;

2. Privileges and Immunities clauses of the United States Constitution, Article IV, Section 2, Clause 2 and of

QUESTION PRESENTED - continued

the Fourteenth Amendment to the United States Constitution, in that the Petitioner was arrested and deprived of his property for the taking and the possession of exclusively Federal fishery resources from the waters of the exclusive economic zone of the United States pursuant to a Federal Law and Regulation then in effect;

3. Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that any United States Citizen, after having sought and received a Federal permit to catch red drum in the United States Exclusive Economic Zone, could catch said fish with impunity as long as those persons chose to possess the fish in any State of the Union with the exception of Florida;

4. Commerce Clause of Article I, Section 8, of the United States Constitution in that the State of Florida arrested the Petitioner and confiscated his catch of red drum which were legally taken, according to Federal Law and Federal Regulation, from the United States Exclusive Economic Zone and which were caught, transported in interstate commerce, and being processed to be sold in interstate commerce;

5. Due Process Clause of the Fourteenth Amendment of the United States Constitution in that the Petitioner was arrested for violation of a state statute and deprived of property, though the statute in question was not reasonably related to the purpose for which it was enacted, nor was enforcement of said statute the least restrictive manner of carrying out the purpose of said statute?

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JURISDICTIONAL STATEMENT

1. The decision of the Supreme Court of Florida, which the Petitioner seeks to have reviewed by this Court, was entered on July 19, 1990. There was no Motion for Re-Hearing filed and thus the decision of the Supreme Court of Florida became final on August 3, 1990 (Fla. R. App. P. 9.330).

2. Jurisdiction is conferred on this Court by Title 28 U.S.C. §1257 and the considerations as set forth in Rule 10 of the Rules of the Supreme Court of the United States, specifically the provisions of 1.(b) and 1.(c) of that Rule. Petitioner contends that the decision sought to be reviewed conflicts with the cases of *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *United States v. Florida*, 425 U.S. 791 (1975); *Louisiana Public Service Comm. v. F.C.C.*, 476 U.S. 355 (1986); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Schweiker v. Wilson*, 450 U.S. 221 (1981); *State of Alaska v. F/V "Baranof"*, 677 P.2d 1245 (Alaska 1984); *People v. Weeren*, 607 P.2d 1279, 163 Cal. Rptr. 255 (1980); *State v. Sterling*, 448 A.2d 785 (R.I. 1982). Further, this is an important question of Federal law which has not been specifically addressed by this Court.

REPORTS OF OPINIONS

1. The decision of the Supreme Court of Florida in the case of *Raffield v. State* is reported at 565 So.2d 704 (1990).

2. The decision of the District Court of Appeal of Florida, First District, in the case of *State v. Raffield*, is reported at 515 So.2d 283 (1987).

3. The decision of the County Court in and for Gulf County, Florida, in the case of *State v. Raffield*, is unreported but bears the reference citation number 84832-A.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCE AND REGULATIONS INVOLVED

Provisions of the United States Constitution:

1. U.S. CONST., Art. I, §8, Cl. 3
2. U.S. CONST., Art. IV, §2, Cl. 1
3. U.S. CONST., Art. VI, Cl. 2
4. U.S. CONST., amend. XIV, §1

Federal Statutory Law Involved:

5. 16 U.S.C. §1801
6. 16 U.S.C. §1812
7. 16 U.S.C. §1851
8. 16 U.S.C. §1852
9. 16 U.S.C. §1855
10. 16 U.S.C. §1856

Federal Regulations Involved:

11. 50 C.F.R. §653, Docket Number 60617-6117

State Statute Involved:

12. Fla. Stat. §370.08(3)

The above cited authorities are set out verbatim in the Appendix hereto.

STATEMENT OF THE CASE

On or about July 1, 1986, the Florida Department of Natural Resources was notified of possible violations of §370.08(3), FLA. STAT., due to the taking of red drum by purse seine in a Florida registered vessel in the Federal waters off of the coast of Louisiana. The Petitioner's fishing vessel, "The Fishermen's Pride", with a Federal Fishery Observer on board, landed a large amount of red drum (in Louisiana) which had been taken by purse seine in the waters of the Exclusive Economic Zone of the United States. The red drum were then trucked to a fish processing plant owned by the Petitioner and located in Port St. Joe, Gulf County, Florida. Upon arrival at Port St. Joe, Florida, the truck drivers and employees of the fish processing plant were confronted by officers of the Florida Marine Patrol and the Petitioner was asked to come down to the plant. Subsequently, the Petitioner, several employees of the fish processing plant, as well as one of the truck drivers, a resident of Florida, were arrested and charged with violating §370.08(3), FLA. STAT. Interestingly, another truck driver, who had also transported the red drum from Louisiana to Port St. Joe, Florida, was never arrested nor charged due to the fact that he was a Louisiana resident. The employees, including the Petitioner, were then formally charged by the State of Florida with violations of §370.08(3), FLA. STAT., and the fish

were confiscated and sold. The Defendants filed a Motion to Dismiss the charges against them on the basis that their arrest by Florida Law Enforcement officers was a violation of rights guaranteed to them by the United States Constitution.

During the period of time that the Defendants' Motion to Dismiss was under consideration, the charges against all Defendants, with the exception of the Petitioner, were dismissed on the basis that the State could not meet their burden of proof "as to the employees of Raffield Fisheries any more than we could meet this burden of proof against a food store, convenience store, or fast food establishment." (letter addressed to the Court from the Office of the State Attorney, 14th Judicial Circuit of Florida, dated September 18, 1986.) *See* Order of David L. Taunton, Gulf County Judge, dated September 25, 1986 as contained in the Appendix hereto.

On September 25, 1986, County Court Judge David L. Taunton, granted the Defendants' Motion to Dismiss, finding that FLA. STAT. §370.08(3) was unconstitutional as a violation of State and Federal due process constitutional provisions and in that it violated the Commerce Clause of the United States Constitution. The Order granting the Defendants' Motion to Dismiss was appealed by the State of Florida to the Florida First District Court of Appeals. After the constitutional issues were fully briefed by the parties, the State Appellate Court reversed and remanded the decision to the County Court and explicitly found §370.08(3) to be constitutional. The Petitioner, Eugene Raffield, then filed a Petition for Writ of Certiorari with the Supreme Court of Florida, with said Writ being granted by that Court. Once again,

all constitutional issues were thoroughly briefed by the parties, with the Supreme Court of Florida approving the result reached by the First District Court of Appeals and expressly declaring valid §370.08(3), FLA. STAT.

The Florida Supreme Court found that " . . . Florida's jurisdiction over Raffield and the red drum he caught in federal waters off Louisiana is plainly authorized . . . " and that "In this instance, the manifest intent underlying the [Florida] statute is to protect food fish, including red drum, from the use of purse seines". Finally, the Florida Supreme Court pointed out that "We also must note that the Statute at issue today does *not* prohibit the importation of food fish, including red drum, obtained from other means . . . under current Florida law, red drum may be sold in Florida, provided it has been harvested by lawful means other than the use of a purse seine." *See* Opinion of Supreme Court of Florida as contained in the Appendix hereto. This Petition followed.

REASONS FOR GRANTING THE WRIT

At the outset, it is the Petitioner's position that a state statute prohibiting the taking of food fish with the use of purse seine *is not* a landing *or* possession law relating to red drum. It is a State attempt to impermissably regulate the Federally approved methods of taking of *all* food fish in the United States Exclusive Economic Zone. The harvesting of federal fishery resources by purse seine was specifically allowed by the Federal Emergency Rule. *All* U.S. fishermen have the *privilege* to use purse seines – and they are *immune* from attempts by

individual states to prosecute such conduct. The use of purse seines in the United States Exclusive Economic Zone was specifically considered and allowed. The Petitioner was covered by Federal Law and Regulation and was subject to further federal "oversight" in the form of a federal agent on board his fishing vessel. In spite of this pervasive Federal regulation of his conduct, the Petitioner was arrested and his property confiscated.

This case deals with a plethora of constitutional issues. At the heart of the matter is the issue of whether a United States citizen's right to harvest an exclusively Federal resource, which is founded under Federal law and Federal regulation, can be abridged by the operation of state law. The Federal questions presented are substantial and the Writ should be granted in order to clear up a very confusing state of affairs which exists as a result of conflicting case law. There is an inherent conflict between federal and state law in this particular area. Failure to grant the instant Writ would affirm the validity of the State of Florida's criminal prosecution of the Petitioner and confiscation of his property for acts specifically allowed by Federal law.

In order to have a complete understanding of the situation now facing the Petitioner, it is necessary to provide this Court with the history of Federal/State conflict in this matter and the manner in which the courts of this Nation have chosen to deal with those conflicts.

Almost fifty (50) years ago, this Court held that in matters affecting their legitimate interests, the individual States could regulate the *conduct* of their citizens on the high seas. This extraterritorial regulation was limited,

however, to situations where there was "no conflict with Federal law". *Skiriotes v. Florida*, 313 U.S. 69 (1941). Four (4) years after this decision, President Truman issued Proclamation Number 2667, asserting Federal ownership of all natural resources from the mean low water of each state to the edge of the Continental Shelf. Pres. Proc. No. 2667, 10 Fed. Reg. 12303, 59 Stat. 884. The case of *United States v. California*, 332 U.S. 19 (1947) upheld the validity of President Truman's Proclamation. This Court held that the United States had *total ownership* and control of the three (3) mile marginal ocean belt of the United States superior to and exclusive of the individual States.

The passage of the *1953 Submerged Lands Act*, 43 U.S.C. 1301, et seq., and the *Outer Continental Shelf Lands Act*, 43 U.S.C. 1331, et seq., constituted the political reaction to President Truman's Proclamation and this Court's decision in *United States v. California*, 322 U.S. 19 (1947). See *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330, 339 (5th Cir. 1978). The respective natural resource rights of the United States and the individual coastal states under the *Submerged Lands Act* and the *Outer Continental Shelf Lands Act* were first decided by this Court in *United States v. Louisiana, et al.*, 364 U.S. 502 (1960). In that case, the Court held that none of the coastal states was entitled to *any interest whatsoever* in the natural resources of the outer continental shelf beyond state boundaries. Eleven (11) years later, this Court was called upon to reaffirm its decision in a case brought against the State of Florida concerning seabed rights. *United States v. Florida*, 403 U.S. 949 (1971). After four (4) years of litigation, the State of Florida entered into a *"Joint Motion for an Entry of a Decree"*. This

Court decreed, *as stipulated by the State of Florida*, that " . . . the State of Florida is not entitled to any interest in . . . " the natural resources underlying the Gulf of Mexico more than three marine leagues from the State's historic coastline. *United States v. Florida*, 425 U.S. 791, 793 (1975).

Immediately after the stipulated decree in *United States v. Florida*, 425 U.S. 791 (1975), Congress enacted the *Magnuson Fishery Conservation and Management Act*, 16 U.S.C. §1801, et seq. Due to the fact that the coastal States were not entitled to *any interest* in the natural resources beyond their boundaries, Congress decreed the United States would exercise exclusive fishery management authority over *all fish* in the Exclusive Economic Zone beyond the States' territorial boundaries. *See* 16 U.S.C. §1801(b)(1) and 16 U.S.C. §1812(1)(2) & (3).

Three (3) years after the passage of the Magnuson Act, the Supreme Court issued its decision in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The Court held that the regulation of natural resources by the State, *even within its own borders*, can be done only in a way which is consistent with the basic principle that " . . . our economic unit is the nation." *Id.* at 338. The Supreme Court held specifically that when a wild animal " . . . becomes an Article of Commerce . . . its use cannot be limited to the citizen of one State to the exclusion of citizens of another State." *Id.* at 338. *Geer v. Connecticut*, 161 U.S. 519, 538 (1896).

The Magnuson Act states under "Findings, Purposes, and Policy", 16 U.S.C. §1801, that the Congress seeks to establish a national program for the development of fisheries which are under utilized or not utilized by the

United States Fishing Industry in order to " . . . assure that our citizens benefit from the employment, food supply and revenue which could be generated thereby." 16 U.S.C. §1801(a)(7). Congress also declared its purpose to include the taking of immediate action within a Fishery Conservation Zone within which the United States would assume exclusive fishery management authority over *all* fish. 16 U.S.C. §1801(b)(1). Congress declared its purpose to include the encouragement of the development of fisheries of the United States fishing industry for *United States fishermen*. 16 U.S.C. §1801(b)(6). It was further declared to be the policy of Congress that fishery conservation and management measures would be based upon " . . . the best scientific information available . . . " and would " . . . involve and be responsive to the needs of interested and affected States and Citizens . . . ". 16 U.S.C. §1801(c)(3). Finally, Congress set out national standards for all fishery management measures which include, in part, that "conservation and management measures shall not discriminate between residents of different States." 16 U.S.C. §1851(a)(4).

Finally, we reach the statutory provision of the Magnuson Act with which this Petition primarily deals. In Title 16, U.S.C. §1855(e), the Magnuson Act provides for emergency actions to be implemented when it is found that an emergency exists involving any fishery and Federal intervention is deemed necessary. In this particular instance, pursuant to the aforementioned provision, the Secretary of Commerce determined that an emergency existed with regard to the federal red drum fishery of the Gulf of Mexico. Therefore, a ninety (90) day emergency rule was issued for the period of June 25, 1986 through

September 23, 1986. Under the ninety (90) day emergency rule, the "total directed net harvest" of red drum (redfish) for the EEZ was limited to one million pounds. The emergency rule in its "Background" statement noted that fishing for red drum in the FCZ "is conducted almost entirely with purse seines though other types of net gear may prove equally as effective." The language of the rule went on to state that *"commercial fishermen harvesting red drum in the Gulf of Mexico FCZ have a vested interest in this fishery."* Finally, the rule indicated that:

> "This restriction results in a substantial limitation on red drum harvest. There is *no credible scientific evidence* to support the conclusion that more restrictive limitations in the FCZ are warranted at this time. The chosen total directed net harvest limit strikes a balance between the urgent need to conserve this valuable resource and the need to preserve the economic and social integrity of those interests, both recreational and commercial, that depend upon the resource. Information obtained during the pendency of this emergency rule will better enable the preparation of a Secretarial plan to manage and conserve the resource and *achieve Optimum Yield* (OY) *from the fishery.*" (emphasis supplied)

50 C.F.R. §653 (*See* "Background").

The emergency rule then goes on, in §653.3, to state that: "these regulations will not be construed to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum." The State of Florida relied on this particular language within the emergency rule in determining that it could validly arrest and charge the Petitioner with a violation of FLA. STAT. §370.08(3). This Florida Statute

makes it a criminal offense to take "food fish" by purse seine "within or without" State waters or possessing "food fish" taken by purse seine.

It must be pointed out that FLA. STAT. §370.08(3) is not a landing law nor a law which prohibits the possession of red drum. It is a statutory scheme which impermissably prohibits the taking or possession of "food fish" taken in Federal waters by a method (purse seine) specifically recognized and accepted by Federal law. Further, it is the Petitioner's position that such a stance cannot be upheld due to an express *statutory* provision of the Magnuson Act. This national standard under the Act provides that "conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocations shall be (A) fair and equitable to all such fishermen . . . " 16 U.S.C. §1851(a)(4). A Federal regulatory agency has no more power than a State to contravene the express directives and purpose of an Act of Congress.

Federal Pre-emption

The resolution of this matter rests on constitutional privileges which are so universally accepted in this Country that little or no cited authority should be necessary to affirm such principles. The Federal government, through the passage of the Magnuson Fishery Conservation and Management Act, assumed *exclusive* management authority over all fishery resources within the Fishery Conservation Zone of the United States. Because Congress's policy, as stated in the Magnuson Act, was to "assure that

the National Fishery Conservation and Management Program utilizes, and is based upon, the best scientific information available . . . " 16 U.S.C. §1801(c)(3), it logically follows that a fishery management plan will *not* be instituted for a fishery when the Federal government sees no need to regulate said fishery. The cases which stand for the proposition that a State may continue to regulate fisheries outside of its territorial waters until conflicting Federal regulations are implemented, i.e.; *Livings v. Davis*, 465 So.2d 507 (Fla. 1985); *State of Alaska v. F/V "Baranof"*, 677 P.2d 1245 (Alaska 1984); *People v. Weeren*, 607 P.2d 1279, 163 Cal. Rptr. 255 (1980), seem to improperly ignore the plain language of the Magnuson Act itself. There seems to have been a failure to research the Legislative history in order to glean the true Legislative purpose behind the Act.

The Legislative history of the Magnuson Act is particularly enlightening as to whether the Act was intended to pre-empt State regulation of "fisheries resources" (as opposed to regulation of State registered "fishing vessels" which is expressly allowed by 16 U.S.C. §1856(a)(3). The Committee Report on the Magnuson Act states in part:

> C. Federal Jurisdiction
>
> . . . there is also a sole Federal jurisdiction over the fishery resources found beyond the three (3) mile territorial sea and within the present twelve (12) mile limit to our fisheries economic zone. *In these waters, it is the Federal government which has the responsibility for whatever management of the fish stocks occur at all.*(emphasis supplied).

D. State Jurisdiction

> Under United States law, the biological resources within the territorial sea of the United States (i.e.; out to three (3) miles) are the management responsibility of the adjacent several states of the union. Whatever regulation *of both fishermen and fish harvest*, that occurs in this area is as deemed necessary and appropriate by each concerned State (emphasis supplied).

H.R. Rep. No. 445, 94th Cong., 2d Sess., *reprinted in* U.S. Code Cong. and Ad. News 593, 601 (1976). This language from the Legislative history of the Act defines the respective jurisdiction and regulatory authority of the Federal and State governments. With regard to the proposition that a fishery management plan or federal regulation must be in force and effect *before* a State is prohibited from regulating extraterritorial fishery resources, the Congressional report also sheds a good deal of light when it states:

> The committee is aware that there are other species of fish that will qualify as being depleted. The most obvious ones have been enumerated in this report. The committee expects the Secretary to carefully study those species of fish that may possibly fall within this definition and take the necessary steps to see that they receive proper management, as the results of improper management are reversible if appropriate action is taken in time.

H.R. Rep. 445, 94th Cong. 2d Sess., 224 *reprinted in* U.S. Code Cong. Ad. News, 593 at 1616 (1976).

The passage of the Magnuson Act *alone* should be held to have totally pre-empted State regulation of fisheries resources by the several states in the United States

Fishery Conservation Zone. Both the statutory and case law which placed management of extraterritorial fisheries resources under *exclusive* Federal control came about subsequent to the handing down by this Court of the decision in the case of *Skiriotes v. Florida*, 313 U.S. 69 (1941). The State Courts in *Livings*, *F/V "Baranof"*, and *Weeren*, *supra*, seem to have developed a "knee jerk" reaction to citing the *Skiriotes* case for the proposition that a State can continue to regulate its registered vessels (or citizens) extraterritorially as long as the regulation the State seeks to enforce does not conflict with Federal law. The blind reliance on the *Skiriotes* case, supra, in light of the passage of the Magnuson Act, has amounted, in many cases, to what could be considered *Affirmance by Rote*. Though the States are still allowed, by the Magnuson Act, to regulate their State registered vessels fishing vessels which journey beyond their boundaries, it is respectfully submitted that the regulation of the vessel must regard matters touching on the health, safety or welfare of the persons participating in the commercial fishing industry. The State law cannot seek continued extraterritorial management of a Federal fishery resource which, by Federal statutory law, is managed *exclusively* by the Federal government.

Should this Court reject the proposition that State extraterritorial enforcement of fishery management laws relating to a Federal fishery resource was not pre-empted by the passage of the Magnuson Act, then there surely cannot be *any* doubt that the Federal government pre-empted the field with regard to the red drum fishery in the Gulf of Mexico during the ninety (90) day period for which the red drum emergency rule was in effect. The

bottom line is that the Federal government, during the ninety (90) day emergency rule period, totally occupied the area of fishery management of red drum and restricted the previously unrestricted taking of red drum in the EEZ to one million pounds. The State of Florida, by enforcing the provisions of FLA. STAT. §370.08(3), attempted to disallow its citizens the right to take or possess red drum taken *pursuant to* and *in compliance with* the Federal rule. Florida's enforcement of §370.08(3), FLA. STAT., to red drum legally taken from the United States' Exclusive Economic Zone south of Louisiana amounts to a denial of equal protection, a denial of a privilege or immunity secured to all United States citizens by the United States Constitution and results in an *absolute* conflict with the Federal law and regulation. The State of Florida must not be allowed to preclude a United States citizen from participating, along with citizens from any other state in the Union, in the red drum fishery of the Exclusive Economic Zone of the United States. The issue is as basic and fundamental as common sense!

This Court has identified several different ways in which Federal law may supersede State law. As summarized in *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986):

> Pre-emption occurs when Congress in enacting a Federal statute expresses a clear intent to pre-empt State law, *Jones v. Rath Packing Company*, 430 U.S. 519 (1977), when there is *outright or actual conflict* between Federal and State, *E.G. v. Bland*, 369 U.S. 663 (1962), where compliance with both Federal and State law is, in effect, physically impossible, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in Federal law a barrier to State

> regulation, *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), where *Congress has legislated comprehensively*, thus *occupying* an *entire field* of regulation and leaving no room for the States to supplement Federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the *State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Heinz v. Davidowitz*, 312 U.S. 52 (1941) (emphasis supplied).

Louisiana Public Service Commission v. F.C.C., at 368, 369

This Court has repeatedly held that State laws can be pre-empted by Federal regulations as well as by Federal statutes. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 701, 713 (1985); *City of New York v. F.C.C.*, 486 U.S. 57 (1988); *Fidelity Federal Savings and Loan Assoc. v. Dayla Cuesta*, 458 U.S. 141 (1982) ("Federal regulations have no less pre-emptive effect than Federal statutes").

The passage of the Magnuson Act *did* evince a case wherein Congress has occupied a field so comprehensively that there is no room for State law to supplement Federal law. Indeed, Congress felt it proper to make a narrow exception to its comprehensive fishery management legislation by providing in 16 U.S.C. § 1856(a)(3), that a State may continue to *regulate* its State registered *fishing vessels* outside of State boundaries in the United States Exclusive Economic Zone. The words of the Magnuson Act and the Legislative history make it clear that continued State "regulation of a fishing vessel" does not refer to the *exclusive* Federal fishery management regulatory authority. Both the Magnuson Act, 16 U.S.C § 1802, and the emergency rule as to the red drum fishery of the

Gulf of Mexico, 50 C.F.R. § 653.2, define the terms "fish" and "fishing", independently. The expressed language of the original legislation, 16 U.S.C. § 1812, provides, *with no exceptions*, that the United States shall exercise *exclusive fishery management* over *all fish* within the United States Exclusive Economic Zone. The Petitioner contends that the Magnuson Act *by itself* has pre-empted the field of the taking of fish (*i.e.* fishery management) within the United States EEZ. Should a State attempt to regulate fishery management, *i.e.* the actual taking of fish, within the Exclusive Economic Zone, then an actual conflict arises between State law and an Act of Congress and Federal regulations adopted thereunder.

Should this Court determine that there is no pre-emption of the methods of actually taking Federal fishery resources *solely* by the passage of Magnuson Act, there was certainly preemption by the enactment of the emergency rule. Even within state boundaries it is clear that "Congressional enactments that do not exclude all State legislation in the same field, nevertheless, override State laws with which they conflict." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). This Court must make it clear that once the Federal regulation of the taking of red drum was implemented under the Magnuson Act, the regulation, of necessity, prevailed over conflicting State law. *State v. Sterling*, 448 A.2d 785, 787 (R.I. 1982) ("at the time the alleged offenses occurred, however, Federal regulations governing the fishing of yellowtail flounder in the EEZ were in effect [and] Rhode Island, therefore had no authority to regulate, directly or indirectly, fishing of this species outside its boundaries in a manner inconsistent

with the Federal regulations"). In this case, the application of FLA. STAT. § 370.08(3) to red drum taken extraterritorially is pre-empted to the extent that it, in effect, prohibits the taking of red drum in a manner and by means *specifically validated* by the Federal fishery management rule, 50 C.F.R. § 653, et seq. In this case, the Florida Courts have, in effect, "allowed" the use of a purse seine on Federal foodfish by all U.S. fishermen *except* Florida citizens or vessels. In this case, there is a *clear* conflict between State and Federal law.

Further, pre-emption can occur "where the State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress". *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 369. It is clear that the enforcement of FLA. STAT. § 370.08(3), with regard to red drum taken from the United States Exclusive Economic Zone, is an obstacle to the accomplishment and execution of the full objectives of the Magnuson Fishery Conservation and Management Act. One of the stated purposes of the Act is to "achieve and maintain, on a continuing basis, the optimum yield from each fishery . . . ". 16 U.S.C. § 1801(b)(3) & (4) (emphasis supplied).

In December of 1986, the Secretarial Fishery Management Plan for red drum was approved and implemented by the Federal government. Though implemented subsequent to the emergency rule which was in effect at the time material to this Petition, the language as contained in the Secretarial Fishery Management Plan is highly enlightening:

> [F]ish, lawfully harvested in the EEZ must be allowed to be possessed, landed, sold and transported to permit free and efficient access of the resource to the stream of commerce (National Standard 5), as well as to achieve optimum yield from the fishery by maximizing the greatest overall benefit of this resource to the Nation (National Standard 1).

Secretarial Management Plan for red drum at 14-2.

The Federal regulations passed at the end of 1986 likewise plainly stated that:

> The Federal government has a responsibility to manage fisheries in the EEZ. Nevertheless, State laws would effectively nullify Federal fishing regulations in the EEZ if States could prohibit not only the landing of fish caught in State waters, but the landing of fish legally caught in the EEZ under Federal regulations.

51 Fed. Reg. 46675-02 (1986).

Common sense tells us that supersession is legally necessary. The Secretary deemed that "it would not ordinarily be fair . . . to apply different rules to people fishing in the EEZ based solely upon their state of citizenship." 51 Fed. Reg. 46675-02 (1986). The legal principles sought to be addressed in this proceeding were expressly recognized by the implementing regulations stating that:

> "landings of red drum lawfully harvested in the EEZ by gill nets, trammel nets, and *purse seines* are *exempt* from *State landing, possession* and sales laws."

51 Fed. Reg. 46675-02 (1986).

The Federal Fishery Management Plan for red drum was based on the best scientific information available. If

Florida disagreed with the emergency rule, its remedy was to have its representative on the Regional Council for the Gulf of Mexico try to convince the Secretary (or the Council) not to pass the emergency rule, or to pass an emergency rule disallowing purse seines in the taking of *any* red drum from the United States Exclusive Economic Zone. The Legislative history shows that the State interests in the EEZ fisheries were to be protected by giving the State's representation on the Regional Councils, *not* by allowing the States to extraterratorily enforce conflicting State fishery management statutes. *See* Legislative History 843-847 (Remarks of Rep. Legett), 94th Cong., 2d Sess. (1976).

Finally, allowing Florida to enforce, in the EEZ, (south of the State of Louisiana) a State fishery management law that conflicts with the Federal regulation in force at the time of the Petitioner's arrest, would defeat the Congressional desire to have a "*National program* for the conservation and management of the fishery resources" of the EEZ. 16 U.S.C § 1801(a)(6) (emphasis added). The states contribute input to the Federal Fishery Management programs through their representatives on the Federal Councils, but the Councils *and* the Secretary of Commerce determine what is best for the Federal fishery as a whole. Allowing each State to adopt and enforce *fishery management provisions* governing their own fishermen or State registered vessels in the EEZ would create an obstacle to the accomplishment of the goal of having a National program for management of Federal fishery resources. Further, the National program for fishery management resources could well be subverted by the input of the state representatives on Federal Regional

Councils. Because each coastal state is given a statutory membership on the fishery management council, 16 U.S.C. § 1852, the state representatives have resisted the adoption of specific plans in favor of continued State extraterritorial regulation.

Privileges and Immunities

Commercial fishing in the United States Exclusive Economic Zone is a privilege and immunity regulated and protected by the Federal Government. As was stated by this Court in the case of *Snowden v. Hughes*, 321 U.S. 1, *reh'g den.*, 321 U.S. 804 (1944); " . . . what is protected by the Fourteenth Amendment are those 'privileges and immunities' which owe their existence to the Federal government, its laws, and Constitution."

This Court concluded in the case of *Toomer v. Witsell*, 334 U.S. 385 (1948) that commercial shrimping " . . . like other common callings is *within* the purview of the privileges and immunities clause", *Id.* at 403. The *Toomer* case dealt with a scenario in which South Carolina was discriminating against citizens of other States with regard to the shrimp fishery within State waters. The instant case deals with a situation whereby a State discriminates against its own citizens by disallowing them privileges and immunities provided to all other United States citizens with regard to the efficient harvest of Federal fishery resources. Florida's case against Mr. Raffield is no less a violation of the Privilege and Immunities Clause than is the situation confronted by this Court in *Toomer*! As the clause itself states . . . "No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States . . . ". U.S. CONST. 14th Amend., § 1. In the case of *Baldwin v. Fish and Game Comm. of Montana,* 436 U.S. 371 (1978), this Court stated that "it was undoubtedly the object of the clause (Privileges or Immunities Clause) in question to place the citizens of each State upon the same footing with the citizens of other States so far as the advantages resulting from citizenship in those States are concerned . . . " *Id.* at 380, 381. It would be unconscionable to allow Louisiana, Alabama or Mississippi commercial fishermen to harvest red drum in the United States Exclusive Economic Zone (south of Louisiana) pursuant to the Federal red drum rule while allowing Florida's enforcement of its fishery management laws to deny the Petitioner the same federal *privilege* and *immunity.*

The Legislative history of the Magnuson Act makes it clear that Congress was specifically concerned about the protection of rights of the United States fishermen such as the Petitioner. "The committee made every effort to see that all segments of the U.S. Fishing Industry were protected, including those fishermen who fish off the coast of other Nations". H.R. Rep. No. 445, 94th Cong., 2d Sess., 224, *reprinted in* (1976) U.S. Code Cong. and Ad. News, 593, at 596. Congress specifically stated that the natural resources outside the territorial limits of the coastal states were to be treated as a *single uniformly regulated* federal resource for the benefit of *all* citizens of the United States without regard to citizenship or state of incorporation. 16 U.S.C. § 1851(4).

Under the Magnuson Act and the Federal rule promulgated thereunder, the Petitioner is the intended beneficiary of a Federal statutory scheme that was intended to

give all United States fishermen, who applied for and were granted a permit to fish pursuant to the Federal rule, the right to make use of Federally regulated amounts of the Federal fishery resources of the Exclusive Economic Zone. The violation of a Federal right that is implicit in a statute's language and structure, is as much a direct violation of a right as is a violation that is clearly set forth in the text of the statute. *See Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989). In the *Golden State Transit* case, *Id.*, this Court pointed out that pre-emption becomes a substantive right if the State law attempts to regulate conduct that is actually protected by Federal law. And *Toomer v. Witsell*, 334 U.S. 385 (1938), specifically holds that commercial fishing *is* within the purview of the Privileges and Immunities Clause and, therefore, "protected by Federal law". Because The Magnuson Act provides for exclusive federal management of the Federal fishery resources, there is definitely a substantive "federal right to fish" in the United States Exclusive Economic Zone. The State of Florida impermissably interfered with this Federal right by the arrest of the Petitioner and the seizure of his catch.

Equal Protection

When initially confronted with the language of FLA. STAT. § 370.08(3), it appears that we are dealing with a State statute that is facially neutral and, therefore, not capable of running afoul of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. However, a law non-discriminatory on its face may be grossly discriminatory in its operation. *Williams v. Illinois*, 399 U.S. 235, 242 (1970). Petitioner contends that

Florida's enforcement of § 370.08(3), FLA. STAT., as applied, and when read *in pari materia* with the State registered vessel exception of 16 U.S.C. § 1856(a)(3), divides United States citizens into two (2) classes; those who can use purse seines as allowed by the Federal regulation and those on Florida registered vessels who cannot use purse seines. Petitioner contends that such a classification is arbitrary, irrational and a violation of the Equal Protection Clause of the United States Constitution. Under the explicit terms of the Magnuson Act *and* the emergency rule itself, the State of Florida could not enforce the provisions of FLA. STAT. § 370.08(3) as to a vessel not registered under the laws of Florida or even, *arguendo,* to anyone not a citizen of the State of Florida (pursuant to *Skiriotes v. Florida*, 313 U.S. 69 [1941]). What is clear is that the vessels registered under the laws of Louisiana, Mississippi or Alabama were free to harvest red drum by purse seine in Federal waters south of Louisiana, immediately adjacent to the Petitioner, *with impunity.* If the fishermen on the other vessels were not citizens of the State of Florida they would be immune from prosecution under FLA. STAT. § 370.08(3) under *either* a State registered vessel exception argument or a *Skiriotes*-type argument. Such a result must not be tolerated.

The general rule is that Legislation is presumed to be valid and will be sustained against an equal protection attack if the classification drawn by the statute is rationally related to a legitimate State interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). The State of Florida has no rational or legal basis for extraterritorial fishery management which treats its registered vessels or citizens any

differently than vessels or citizens from other states. The one million pound limit of red drum would have been taken from the Exclusive Economic Zone in the Gulf of Mexico whether the Petitioner was allowed to participate or not. Florida's enforcement of FLA. STAT. § 370.08(3) as to red drum caught with purse seine in the EEZ south of Louisiana did *nothing whatsoever* to protect the Florida red drum population! While Petitioner does not dispute that Florida would have the right to enforce the provisions of FLA. STAT. § 370.08(3) with regard to "food fish" taken *within* Florida's waters, it is respectfully submitted that to enforce the same provisions against Florida registered vessels or Florida citizens with regard to red drum taken from the United States Exclusive Economic Zone south of the State of Louisiana is a denial of the equal protection of Federal law (The Magnuson Act) as guaranteed by the United States Constitution.

Interstate Commerce

There can be no question that Florida's extraterritorial enforcement of § 370.08(3), FLA. STAT., is an impermissible burden on interstate commerce. In fact, the red drum caught in Federal waters off the coast of Louisiana were shipped in interstate commerce from Louisiana to Florida before they were confiscated and the Petitioner arrested. It is clear that the regulatory power of Congress over interstate commerce begins when the intercourse begins. *Carter v. Carter Coal Company,* 298 U.S. 239 (1936). Once a product crosses a State line *at any state of its movement to the ultimate consumer,* it is considered to be in interstate commerce. The fact that the product is delivered to a State for processing before being shipped out to

the ultimate consumers is irrelevant. *Maryland v. Louisiana,* 451 U.S. 725 (1981).

Clearly, a State may attempt to confine the consumption of its fish and game wholly within the State's limits. *Geer v. Connecticut,* 161 U.S. 519 (1896), but in this case we are *not* dealing with Florida's fish or game. In this case we are dealing with Federal fishery resources to which . . . "the State of Florida is not entitled to any interest . . . ". *United States v. Florida,* 425 U.S. at 793 (1975). When a State regulates the sending of products across State lines, there is commerce among the States as to which State intervention is subordinate to the Commerce Clause. *See Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928).

In the July 19, 1990, decision of the Florida Supreme Court there is dictum which indicates that the Petitioner could have been arrested even had he off-loaded and processed his red drum in Louisiana and had sent the processed fish to different areas of the nation. In this case, however, the Petitioner was charged with possession of "illegally taken" red drum once the fish were within the State of Florida. Under the facts of this case, the Petitioner, to avoid prosecution, would have had to process and ship the red drum in a State other than Florida. There is no doubt that his costs would have been materially increased due to the fact that he would not have been able to use his own storage and processing facilities in Florida. In this case, the enforcement of Florida's statutory scheme imposes an artificial rigidity on the economic pattern of the fishing industry. The Florida Court's decision would force persons in the position of the Petitioner to divert their business to states other than Florida or, if

the State was proceeding under the "taking of foodfish within or without" the waters of the State of Florida (as opposed to the "possession" provision), then it would force persons in the position of the Petitioner to use vessels registered in states other than Florida and crew members other than Florida citizens when harvesting Federal fishery resources.

The enforcement of the Florida purse seine law as to Federal fishery resources, of necessity, disadvantages Florida's commercial fishermen and fish processors. The enforcement of FLA. STAT. § 370.08(3) restricts the movement of legally caught red drum into the State of Florida and requires additional expense and processing outside of the State of Florida in order to avoid the statute's consequences. Such artificial rigidity on the economic pattern of the industry cannot stand a Commerce Clause attack according to this Court's opinion in *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948).

It is a general rule that a State statute which attempts to effectuate a legitimate public interest with *only incidental effects* on interstate commerce will be upheld, *unless* the burden imposed is clearly excessive in relation to the putative local benefit. In determining how far a statute will be allowed to burden interstate commerce, the Courts will examine the nature of the local interest involved and will also seek to determine if this interest could be promoted as well with a lesser impact on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1969).

In this case, the state can evince no argument which would show that the enforcement of the State statutory

scheme, as to fish taken extraterritorially by purse seine, would in any way "preserve or protect" the State red drum population. The allocated amount of Federal red drum in the Exclusive Economic Zone of the United States (specifically the red drum south of Louisiana) would be taken *irregardless* of Florida's enforcement of § 370.08(3), FLA. STAT. The State's attempt to enforce the provisions of state statutory law with regard to red drum taken by purse seine within the United States Exclusive Economic Zone is a violation of the Commerce Clause. The less restrictive application of the state statutory scheme to red drum taken only within State waters accomplishes the exact same results during the period of time that the emergency rule for the red drum fishery of the Gulf of Mexico was in force. 50 C.F.R. § 653, et seq.

This Court has repeatedly held that where the subject of a State statute is national in character and admits and requires uniformity of regulation, Congress alone can provide the needed regulation. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1972); *Cooley v. Board of Wardens*, 53 U.S. 299 (1931). It has been pointed out previously in this Petition that the main purpose of the Magnuson Act, 16 U.S.C. § 1801, et seq., was to provide a uniform and non-discriminatory *national program* of fishery management. In this case, Florida's enforcement of § 370.08(3), FLA. STAT. to the Federal fishery resources of the United States Exclusive Economic Zone runs afoul of congressional intent.

Due Process

Under requirements of Due Process, a State is free to adopt whatever economic policy may be reasonably

deemed to promote public welfare and to enforce legislation adapted to that purpose. However, these laws must have a reasonable relation to a proper legitimate purpose and be neither arbitrary nor discriminatory. *Nebbia v. New York*, 291 U.S. 502 (1934). In this case, the enforcement of FLA. STAT. § 370.08(3) to "food fish" taken by purse seine outside Florida's territorial waters, is not reasonably related to the legislative purpose for which FLA. STAT. § 370.08(3) was enacted. Florida's extraterritorial application to red drum caught south of Louisiana does not *in any way* protect Florida's red drum fishery. The one million pounds allowable catch of red drum which was in effect during the ninety (90) days while the Federal rule was in effect would have been taken *irregardless* of the manner in which Florida chose to enforce its laws. Even in the absence of the Federal red drum rule, it is clear that the State of Florida could not, even arguably, enforce the provisions of FLA. STAT. § 370.08(3), beyond State waters as to vessels registered under the laws of states other than Florida or as to persons who are not citizens of the State of Florida. In effect, Florida's extraterritorial enforcement had no effect other than to convict Petitioner of a crime and deprive him of his property.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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NO. ___

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

EUGENE RAFFIELD, Petitioner

vs.

STATE OF FLORIDA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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SUPREME COURT OF FLORIDA

No. 71,677

EUGENE RAFFIELD, et al.,

Petitioners,

vs.

STATE OF FLORIDA,

Respondents.

[July 19, 1990]

KOGAN, J.

We have for review *State v. Raffield*, 515 So.2d 283 (Fla. 1st DCA 1987), which expressly declared valid subsection 370.08(3), Florida Statutes (1985). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Eugene Raffield, owner of a fish processing plant in Gulf County, Florida, received a federal permit to catch red fish in federal waters in the Gulf of Mexico. On July 1, 1986, the United States Fish and Wildlife Service notified the Florida Department of Natural Resources that Raffield may have violated Florida law by harvesting red fish using a purse seine. The fish were caught off the coast of Louisiana, landed at Venice, Louisiana, and taken to Port St. Joe, Florida. Subsequently, Raffield and several others were arrested in Florida for possessing fish caught in violation of section 370.08(3), Florida Statutes.

The statute provides in pertinent part: "No person may take fish within or without the waters of this state with a purse seine. . . . or have any food fish so taken in

his possession for sale or shipment." § 370.08(3), Fla. Stat. (1985).

Raffield filed a motion to dismiss the charges on grounds that the statute had been preempted by federal law, was unconstitutional and had been enforced in an arbitrary and capricious manner. The trial court granted the motion, but later was reversed by the First District. *Raffield*, 515 So.2d at 284.

On the question of preemption, we cannot agree with Raffield's argument that federal regulations affecting the red drum fishery have preempted Florida law. By their own terms, the rules do the opposite. The rules preamble states:

> The Secretary recognizes the conservation and management efforts of the coastal states in the Gulf of Mexico with regard to the red drum fishery. The Secretary desires to support those efforts through ths [sic] emergency action to the maximum extent permitted under the Magnuson [Fishery Conservation and Management] Act.[1] It is the intent of the Secretary to supplement the States' efforts to conserve red drum. *Therefore, the emergency rule does not supersede any State landing laws which apply to red drum.* For purposes of the emergency rule, a State landing law is a statute, regulation or ordinance which makes it unlawful to land or possess within the jurisdiction of a State any red drum.

51 Fed. Reg. 23,553 (1986) (emphasis added). Implementing this statement of intent, the actual rules provide:

---

[1] *See* 16 U.S.C. § 1855(e)(1)(1988).

> (a) Persons affected by these regulations should be aware that other Federal and State statutes and regulations may apply to their activities.
>
> . . . .
>
> (d) *These regulations will not be construed to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum.*

Id. at 23,554 (emphasis added).

The statute at issue today manifestly is a "State law which prohibits the landing or possession" of red drum caught with a purse seine. Thus, we find no preemption. If anything, the federal government has actively *encouraged* the efforts of the state to reduce the burden on the red drum fishery caused by the sudden popularity of "blackened redfish" and the resulting insatiable demand for commercial red drum. And as we stated in *Livings v. Davis*, 465 So.2d 507, 509 (Fla. 1985),

> the [Magnuson Act] makes no attempt to preempt the field, but in fact recognizes continued state jurisdiction over vessels registered under the laws of the various states.

Here, Florida's jurisdiction over Raffield and the red drum he caught in federal waters off Louisiana is plainly authorized by the federal officer charged with administering the Magnuson Act. 51 Fed. Reg. at 23,553-54. The interpretation of administrative officers with special expertise, who are charged to administer a law, are entitled to judicial deference and will be given great weight in the courts of Florida. *United States Gypsum Co. v. Green,*

110 So.2d 409 (Fla. 1959). Accordingly, we conclude that no preemption has occurred in this instance.

Our opinion in *Southeastern Fisheries Association, Inc. v. Department of Natural Resources*, 453 So.2d 1351 (Fla. 1984), does not dictate a different result. In *Southeastern Fisheries* we dealt exclusively with the issue of whether a law could be enforced outside the territorial limits of Florida in the absence of an express provision to that effect by the legislature. Here, the law is not being applied beyond the territorial limits of the state. Raffield is charged with illegal possession of certain red drum *within* Florida. Moreover, even if this statute could be construed as applying beyond the state's territorial limits, the legislature has expressly provided that the statute applies to fish taken "without the waters of this state with a purse seine." § 370.08(3), Fla. Stat. (1985). Accordingly, *Southeastern Fisheries* is readily distinguishable from the present case.

Next, Raffield contends that the statute violates due process and equal protection because it allegedly is vague and susceptible of more than one interpretation, and is enforced capriciously. However, we find insufficient evidence in the record to support these allegations within the facts of this case. Moreover, we agree with the district court's observation that the statute is sufficiently definite to apprise persons of common intelligence of the activities that are prohibited. *Raffield*, 515 So.2d at 286 (citing *Gardner v. Johnson*, 451 So.2d 477, 478-79 (Fla. 1984)). We also agree that Florida legitimately may regulate the conduct of its own citizens and residents without violating equal protection, even though similar regulations might

not exist in other states. *Id.* (citing *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941)).

Finally, Raffield argues that this statute violates the commerce clause. Art. I, § 8, cl. 2, U.S. Const. Initially, we will assume for the sake of argument that the statute at issue today is subject to a more demanding judicial scrutiny because it affirmatively impedes interstate commerce in red drum caught in a certain manner. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). Thus,

> the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Id. (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

There is no doubt that the state has satisfied its burden as to the first prong of this test. Florida clearly has an interest in protecting fisheries that are a vital source of food for its residents, even though the fisheries lie beyond the territorial limits of the state. *Skiriotes v. State*, 313 U.S. 69 (1941); *Livings v. Davis*, 465 So.2d 507 (Fla. 1985); *State v. Millington*, 377 So.2d 685 (Fla. 1979).

We also conclude that the state has met its burden as to the second prong of the test. In this instance, the manifest intent underlying the statute is to protect food fish, including red drum, from the use of purse seines. This record discloses that purse seines are an extremely efficient method of fishing – in fact, so efficient that they have threatened to wipe out some species of commercial food fish. This statute is directed at this evil in the only possible way: It eliminates Florida as a market for food

fish obtained by using purse seines. We can conceive of no other "available nondiscriminatory means" that would achieve the state's purpose in this instance.

The fact that other states have not adopted similar legislation is not relevant to our inquiry today. Florida's extensive coastline historically has given it a special stake in fishing activities in the Gulf of Mexico and Atlantic Ocean. Fishing is a vitally important industry in this state's economy. Simultaneously, we must recognize that Florida is one of the most populous states in this region, thus resulting in special burdens on the food-fish industry. Because of Florida's unique position, the legislature legitimately has concluded that special conservation measures must be implemented to preserve the food-fish industry. Eliminating Florida as potential market for food fish harvested by purse seines is such a conservation measure.

We also must note that the statute at issue today does *not* prohibit the importation of food fish, including red drum, obtained from other means. Although this is obvious on the face of the statute, the point needs belaboring. Under current Florida law, red drum still may be sold in Florida, provided it has been harvested by lawful means other than the use of a purse seine. The only burden this statute places on interstate commerce is to require fishing concerns to harvest fish by means consistent with sound conservation, as determined by the Florida legislature. Moreover, the statute applies to resident and nonresident alike and confers no special benefit on Florida or out-of-state residents.

We thus conclude that, even under the most rigorous scrutiny conceivable applicable here, the statute does not violate the commerce clause. *See Maine*, 477 U.S. at 138. The result reached by the district court is approved.

It is so ordered.

SHAW, C.J. and OVERTON, McDONALD, EHRLICH, BARKETT and GRIMES, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal – Statutory Validity

First District – Case No. BP-439

(Gulf County)

Kenneth G. Oertel and Segundo J. Fernandez of Oertel, Hoffman, Fernandez & Cole, P.A., Tallahassee, Florida,

for Petitioners

Robert A. Butterworth, Attorney General and Bradford L. Thomas, Assistant Attorney General, Tallahassee, Florida; and Tom Gardner, Executive Director, Department of Natural Resources and Charles R. McCoy, Assistant General Counsel, Tallahassee, Florida,

for Respondents

Karen Hope Yore, General Counsel, Tallahassee, Florida,

Amicus Curiae for Southeastern Fisheries Association, Inc.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA, Appellant, vs. EUGENE RAFFIELD, et al., Appellees.	:	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED. CASE NO. BP-439

Opinion filed October 20, 1987.

An Appeal from the County Court for Gulf County. David L. Taunton, Judge.

Robert A. Butterworth, Attorney General; John W. Tiedemann and Bradford L. Thomas, Assistant Attorney Generals, Tallahassee; and Charles R. McCoy, Assistant General Counsel, Department of Natural Resources, Tallahassee, for Appellant.

Kenneth G. Oertel, Oertel and Hoffman, Tallahassee, for Appellees.

ERVIN, J.

The State of Florida appeals a county court's order dismissing misdemeanor charges against Eugene Raffield, et al., on the grounds that the statute on which the charges were based, Section 370.08(3), Florida Statutes (1985), violates the due process provisions of the Florida and United States Constitutions and the commerce clause of the United States Constitution. We reverse, finding no constitutional infirmities.

Section 370.08(3) forbids the taking of "fish food within or without the waters of this state with [the use of] a purse seine, purse gill net, or other net using rings or other devices on the lead line thereof, through which a

purse line is drawn. . . . " Section 370.08(3) also prohibits the possession of food fish so taken for sale or shipment. Violation of the statute is a misdemeanor.

The National Marine Fisheries Service on June 30, 1986 issued an emergency rule pursuant to the authority provided in Section 305(e)(1) of the Magnuson Fishery Conservation and Management Act (16 U.S.C.A. § 1885(e)(1)), limiting the total harvest of red fish in the federal conservation zone to one million pounds during the 90-day period between June 25, 1986 and September 23, 1986. 51 Fed. Reg. 23,511 (1986) (to be codified at 50 C.F.R. § 653). The emergency rule established permitting requirements and required all fishing vessels to have on board federal observers.

Appellee, Eugene Raffield, the owner of a fish processing plant in Gulf County, Florida, received a federal permit pursuant to the emergency rule to catch red fish. On July 1, 1986, the United States Fish and Wildlife Service notified the Florida Department of Natural Resources that possible violations of section 370.08(3) had occurred, due to the taking of red fish by purse seine in a Florida registered vessel in federal waters off the coast of Louisiana. The fish were landed in Louisiana and then trucked to Port St. Joe, Florida, where appellee, Eugene Raffield, and several personnel who assisted in the trucking and processing of the fish were arrested at the site of the Raffield fish processing plant in Port St. Joe, Florida. Citations were issued, charging Eugene Raffield and Raffield Fisheries, Inc., with violating section 370.08(3) for possessing food fish (red drum) that were taken by illegal means (purse seine). Appellee filed a motion to dismiss the charges, arguing alternatively that section

370.08(3) had been preempted by federal law, is unconstitutional, and that its enforcement was carried out in an arbitrary, capricious and selective manner. A county court judge issued an order granting Raffield's motion to dismiss, finding the statute to be an unconstitutional violation of the due process provisions of the Florida and United States Constitutions, and a violation of the commerce clause of the United States Constitution.

I.

We first observe that the adoption of the Magnuson Fishery Conservation and Management Act by Congress did not preempt the right of the State of Florida to regulate commercial fishing outside the territorial limits of this state. *See Livings v. Davis*, 463 So.2d 507 (Fla. 1985) (the adoption of the Magnuson Act does not preempt the State of Florida from regulating state-registered vessels in the state's extraterritorial waters in the absence of a conflicting regulation implementing a federal plan managing the same fishery). *Accord Potter v. McCullers*, 505 So.2d 511 (Fla. 3d DCA 1987). In *Livings*, fishermen were arrested for violating a state statute prohibiting the taking or possession of small shrimp on March 31, April 13 and May 2, 1981, prior to the effective date of a federal management plan that was adopted for the shrimp fishery on May 20, 1981. The Florida Supreme Court ruled that before the adoption of the federal management plan, the Magnuson Act did not preempt state extraterritorial fishing regulations.

The instant case is similar to *Livings*. Appellees at bar were arrested for possession of red fish taken by purse

seine on July 16, 1986, in the state of Florida. At the time of appellees' arrest, the emergency interim rule then in effect, regarding the red fish harvest, specifically stated that it "does *not supersede* any state landing laws which apply to red drum." 51 Fed.Reg. 23,551, 23,553 (e.s.). The emergency interim rule went into effect June 25, 1986, and was the operative regulation when the charge offenses occurred. At that point in time,[1] there was no preemption of state regulation affecting the landing of red fish.

II.

We find also that the trial court erred in holding that section 360.08(3) violates the federal commerce clause in that we are unable to perceive that the statute's provisions involve any undue burden on interstate commerce. In *State v. Millington*, 377 So.2d 685, 688 (Fla. 1979), the Florida Supreme Court held that a statute banning the importation of undersized shrimp taken from outside the territorial limits of Florida was not an unconstitutional burden on interstate commerce, stating: "[T]o the extent that [the statute,] as it relates to possession of 'small shrimp'[,] may affect interstate or foreign commerce, we find that this result is purely incidental, indirect, and

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[1] The Commerce Department subsequently published a fishery management plan for the red drum fishery, effective December 24, 1986, which preempts state regulation of the red drum fishery. 51 Fed. Reg. 46,675 (1986) (to be codified at 50 CFR § 653). The final rule implementing the fishery management plan for the red drum fishery became effective October 16, 1987. 52 Fed. Reg. 34,918 (1987) (to be codified at 50 CFR § 653).

beyond the purpose of the legislation and does not invalidate the statute." *Millington* relied on *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772 (1936), which upheld a law banning the transportation of sardines from the high seas into the State of California for the manufacture of fish flour. The fish flour was made with the expectation that it would be sold and shipped in interstate commerce.

In our judgment the statute at issue is similar to the statutes challenged in *State v. Millington* and *Bayside Fish Flour Co. v. Gentry*, and any burden placed on interstate commerce by its operation is incidental to the primary, valid purpose of protecting the state's supply of food fish. *See also National Fishermen Producers Cooperative Society, Ltd. of Belize City v. State*, 503 So.2d 430 (Fla. 3d DCA 1987) (Florida regulations regarding possession of lobster tail, even when in interstate transit, are not such a burden on interstate commerce as to violate the commerce clause). In *National Fisherman*, the State of Florida was found to have a valid purpose in confiscating crawfish moving through the state in interstate commerce, even though the seafood was not destined to be marketed in Florida and the owner of the seafood was a foreign entity.

III.

The county court judge concluded also the statute was void for vagueness and violated the due process provisions of the United States and Florida constitutions, due to varying interpretations of the statute by officials from the Florida Marine Patrol. We disagree. If the statutory language is sufficiently clear, the fact that officials

placed different interpretations on the statute does not make the statute void for vagueness. "Small variances in the understanding of individual officers which could possibly be clarified on closer reading of the statute does not necessarily show vagueness. *Gardner v. Johnson*, 451 So.2d 477, 478 (Fla. 1984). "A statute must be definite enough to apprise a person of common intelligence of the activity sought to be proscribed." *Id.* Section 370.08(3) plainly states that "no person may take food fish within or without the waters of the state with a purse seine . . . , or have any food fish so taken in his possession for sale or shipment." In the case at bar the red fish were taken from federal waters off the coast of Louisiana and trucked to Florida. The statute bars the possession in Florida of such fish that were illegally taken by purse seine elsewhere. The behavior which is proscribed by the statute is clear and the statute is not unconstitutionally void for vagueness.

IV.

The county court also stated that there were equal protection problems with the statute, since apparently, it was his belief that there was selective enforcement of the statute against Florida citizens, and not others. We disagree. A statute which regulates the conduct of the citizens of Florida, either within or without the territorial limits of the state, does not violate equal protection. *See Skiriotes v. Florida*, 313 U.S. 69, 77, 61 S.Ct. 924, 929, 85 L.Ed. 1193, 1200 (1941). In *Skiriotes*, the Supreme Court held that a state may constitutionally govern the conduct of its citizens upon the high seas with respect to matters for which the state has a legitimate interest, provided

there is no conflict with acts of Congress. Skiriotes objected to enforcement of the state's prohibition on sponge diving in an area which he alleged was outside of the jurisdictional limits of the State of Florida. Similarly we find no violation of equal protection clause by the statute in question, as it regulates the taking of food fish by Florida citizens outside the territorial waters of the state in order to enforce a matter for which the state has a legitimate interest – the conservation of the fishery resource.

We therefore reverse the order of the county court granting appellee's motion to dismiss and declaring section 370.08(3) unconstitutional.

REVERSED and REMANDED for consistent proceedings.

SMITH, C.J., and BOOTH, J., CONCUR.

IN AND FOR THE
COUNTY COURT
GULF COUNTY,
FLORIDA.

Citations # 84832-A Fla.
Marine Patrols, etc.

In Ref: The Matter of
Seizure of
Perishable
Seafood Product

STATE OF FLORIDA

vs.

EUGENE RAFFIELD, et al.

_____/

ORDER GRANTING DEFENDANTS
MOTION TO DISMISS

UPON HEARING of Defendents' Motion to Dismiss and after being fully advised in the premises thereof the Court finds that the statute under which the Defendants are charged is unconstitutional. Florida Statutes Section 370.08(3) provides:

> (3) USE OF PURSE SEINES, GIL NETS, AND POUND NETS, ETC. No person may take food fish within or without the waters of this state with a purse seine, purse gill net, or other net using rings or other devices on the lead line thereof, through which a purse line is drawn, or pound net, or have any food fish so taken in his possession for sale or shipment. The provisions of this section shall not apply to shrimp nets or to pound nets or purse seines when used for the taking of tuna or menhaden fish only.

The basis for the Court finding this statute unconstitutional is two-fold. One, the statute violates state and federal due process constitutional provisions. Two, the statute also violates the commerce clause of the United States Constitution.

Rationale of Court's Findings

ONE, AS VIOLATING DUE PROCESS, consider the following: The statute plainly states in part that *"no person* may take food fish within or without the waters of the state with a purse seine . . . or have any food fish so taken in his possession for sale or shipment." The statute excepts only tuna or menhaden fish.

On its face, the statute seems clear enough, at first. However, the State admits that application of the statute is not quite so simple.

In its Response in Opposition to Motion to Dismiss, and Memorandum Supporting said Response, the State concedes that Section 306(a) of the Magnuson Act, 16 U.S.C. 1856(a), effectively prohibits regulation by the state of any fishing vessel outside the state's territorial waters *except such vessels that are registered in Florida.* Specifically, this section states:

> "No state may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such state." 16 U.S.C. 1856(a), Section 306(a).

Furthermore, the State's Memorandum states, " . . . Florida is not arguing that its 'purse seine law' can now be enforced in federal waters." *Id.* p. 5.

However, when Florida Marine Patrol Deputy Director, Lieutenant Colonel Clifford S. Kidd was specifically asked when a violation of this statute would occur if a Florida resident in a Florida vessel were to fish for food fish with a purse seine outside the territorial waters of Florida, he answered, "It would be my impression that when they (fish) were caught with the purse seine." (Deposition of Clifford S. Kidd, taken on August 22, 1986 at page 73.)

The deposition continued:

> Question (by defense attorney) – "So the moment of catching, no matter where in the world they are caught, would be your interpretation as to when the violation occured?"
>
> Answer (by Mr. Kidd) – "Yes sir." *Id.* page 73.

When asked whether violation of the law would occur if a Florida resident in a non-Florida vessel used a purse seine to catch food fish in waters outside the territorial waters of the state, Mr. Kidd responded "I don't know." *Id.* page 74.

But, Florida Marine Patrol Director, Colonel Donald M. Ellingsen, in an effort to further clarify the statute states:

> "Well, I think there is two ways to look at that law. And one is if it's a Florida citizen or a Florida boat, I think Florida clearly has police power over that citizen. Another way is if the fish is one that is – I can't put my tongue on the right word, but a Florida particular species, particular to Florida, then I think we can regulate that species off our coastline, off of our shore, within or without our waters." (Deposition of

> Donald N. Ellingsen, taken on August 22, 1986 at page 13.

Ironically, the State's own lawyer concedes that both Lieutenant Colonel Kidd and Colonel Ellingsen are incorrect in their interpretation of the law. Attorney Charles R. McCoy, Assistant Legal Counsel for the Department of Natural Resources, in his *Response in Opposition to Motion to Dismiss, and Memorandum Supporting said Response* states:

> "At the outset, Florida is not arguing that its 'purse seine law' can now be enforced in federal waters." *Id.* page 5.

The reason for the state's concession is made clear in *Southeastern Fisheries Association, Inc. v. Livings*, slip opinion (S. D. Fla. 1983), the United States District Court stated:

> " . . . the state's application of Section 370.08(3) to out-of-state vessels would constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause."

It is not surprising that considering the understanding of the law of the Marine Patrol Director and Deputy Director as of August 22, 1986 (the date of their depositions) that on July 16, 1986 the Defendants in this case were arrested. However, by the time of arguing against Defendants' *Motion to Dismiss*, counsel for the State, although acknowledging the Director and Deputy Director's misinterpretation of the law, attempted to salvage enough of the statute to maintain charges against all the

Defendants. Attorney for the State, Charles McCoy contended that a "savings clause" in the June 25, 1986 emergency regulation promulgated by the United States Department of Commerce allowed the latter portion of Florida Statutes 370.08(3) to remain intact. Basically the State's contention then became that merely having "any food fish so taken (by purse seine) in his possession for sale or shipment" constituted the alleged violation against all the Defendants.

However, three days later, with this decision yet pending, the local State Attorney's office formally announced to the Court dismissal of charges against all the Defendants except CARL EUGENE RAFFIELD and RAFFIELD FISHERIES, INC., adding yet another twist to the understanding of this law as follows:

> "The reason for this dismissal as to these individuals is:
>
> Florida Statute 370.08(3), possession of food fish for sale or shipment taken by purse seine, requires proof beyond a reasonable doubt that the offender knew the food fish so possessed for sale or shipment were taken by purse seine or other prohibited means.
>
> We cannot meet this burden of proof as to the employees of Raffield Fisheries any more than we could meet this burden of proof against a food store, convenience store, or fastfood establishment." (Letter addressed to the Court from the Office of the State Attorney, Fourteenth Judicial Circuit of Florida, dated September 18, 1986.)

Due process requires that a statute not be so vague as to necessitate persons of ordinary intelligence to guess at

its meaning and differ as to its application. *Marrs v. State of Florida*, 413 So. 2d 774, 775 (Fla. 1st DCA 1982).

Upon deposition, Lieutenant Colonel Clifford S. Kidd, who acknowledged that he was in charge of all (Marine Patrol) law enforcement (Deposition of Kidd, August 22, 1986, p. 4), when given four hypothetical, factual situations and asked whether each would be a violation of Florida Statute 370.08(3) responded as follows:

"I would assume so." *Id.*, p. 73, line 11.

"I don't know." *Id.*, p. 74, line 3.

"Not that I am aware of." *Id.*, p. 74, line 12.

"I would assume yes." *Id.*, p. 74, line 6.

Furthermore, in accordance with Lieutenant Colonel Kidd's understanding of the law, that the violation occurred at the time of the catching (seizing of the fish), those aboard the fishing boats should have been arrested if they were Florida residents in a Florida vessel. However, if they were Florida residents but not in a Florida vessel, he did not know if they were violating the law. (Note: none of the fisherman were arrested.)

But then, lieutenant Colonel Kidd's superior, Colonel Donald N. Ellingsen, Director of the Florida Marine Patrol, according to his understanding of the law, either Florida residency or being on a Florida vessel, at the time of catching the fish would have been sufficient to constitute the violation and evoke the arrest powers of the State.

Then comes Attorney Charles R. McCoy, Assistant Legal Counsel for the Department of Natural Resources

and differs with both the Director and Deputy Director of the Marine Patrol. He contends that neither the fishermen (Florida residency) nor the boat (Florida registered vessel) mattered. Instead, it was the transporting and possession of the fish in the State of Florida that constituted the crime. Consequently, the truck drivers and certain personnel of RAFFIELD FISHERIES, INC. were arrested.

However, not all the truck drivers were arrested. Yet another Marine Patrol officer made the determination that a Louisiana truck driver who committed the same acts as the arrested truck drivers should not be charged because, "He didn't know it was a violation, and he didn't work for the company, and he was just hauling the load", (Deposition of Kidd, August 22, 1986, p. 61, lines 19, 20) apparently adding yet another twist to the State's interpretation of the law.

Finally, along came the State's Attorney and differs with all the State's men and proclaims that only CARL EUGENE RAFFIELD and RAFFIELD FISHERIES, INC., were in violation of the statute.

Again, due process requires that a statute not be so vague as to necessitate persons of ordinary intelligence to guess at its meaning and differ as to its application. *Marrs v. State of Florida*, 413 So.2d 774, 775 (Fla. 1st DCA 1982).

Assuming these (above mentioned individuals) are "persons of ordinary intelligence, (which no doubt they are) it is obvious that they guessed at the statute's meaning and differed as to its application. Consequently, the Court hereby declares Florida Statutes 370.08(3) to be unconstitutional in that it violates State and Federal due process constitutional provisions.

If, by any stretch of the Court's legal imagination this statute could withstand the constitutional muster of due process, passing the vagueness test, there would yet remain serious concerns as to the issues of equal protection, and violation of the Commerce Clause.

Two, as violating the Commerce Clause, consider the following:

The fact is that the National Marine Fisheries Services (NMFS) of the United States Department of Commerce, in June of 1986, issued an emergency rule allowing for a new harvest of one million pounds of red drum from the fishery conservation zone (FRZ) within a period not to exceed 90 days. The rule stated in part:

> "To safeguard the red drum resource from over exploitation, the Secretary is issuing this emergency interim rule. This rule limits the total directed net harvest of red drum from the FTZ to one million pounds for the 90-day effective period. . . . When the one million pound limit is reached or projected to be reached, all directed net fishing for red drum in the Gulf of Mexico will be prohibited.
>
> This restriction results in a substantial limitation on red drum harvest. There is no credible scientific evidence to support the conclusion that more restrictive limitations in the FCZ are warranted at this time." 50 CFR Part 653, Docket No. 60617-6117.

RAFFIELD FISHERIES, INC.'s boat, "Fisherman's Pride", along with a number of other boats from various states, was issued a permit to participate in the designated catch. When the one million pound limit was

reached the netting was stopped. Not one pound of additional red fish was netted due to the role of RAFFIELD FISHERIES, INC. in this operation! The one million pounds would have been caught with or without RAFFIELD's participation. Consequently, in no way did RAFFIELD in the alleged violation further diminish the red fish population of the Gulf of Mexico, not even by one fish.

Furthermore, consider the rationale of the United States District Court in *Southeastern Fisheries Association, Inc. v. Livings*, slip opinion (S. D. Fla. 1983) (Order Granting Plaintiff's Motion for temporary Restraining Order) which effectively declared Florida Statute 370.08(3) unconstitutional as applied to out-of-state vessels, stating that any such application would "constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause." *Id.*, page 6.

The Court continued:

> "On the other hand, it is neither fair nor equitable to allow boats registered in other states to reap the benefits the Act opens to them when Florida vessels are prohibited from the same conduct. Since congress has permitted the use of purse seines in the FCZ by all vessels, Florida may not now prohibit its citizens' vessels from engaging in the type of fishing congress has specifically allowed without violating the Plaintiffs' (and other Florida citizens') rights to equal protection." *Id.*, pages 6,7.

Basically, the Court is arguing that Florida citizens should benefit as any citizen of any other state from such catches as that at issue. To deny RAFFIELD FISHERIES, INC. the right to any and all benefits bestowed upon

citizens of other states would seem to violate the intent of the Commerce Clause. One such benefit would be processing and sale of the fish.

Those fish (one million pounds) were to be caught by someone. They had to be processed somewhere. Why should a Florida fishery (specifically, RAFFIELD) be denied participation in the economic benefits therefrom? The State argues:

> "The statute in question does not impair, prohibit, or interfere with Defendants' (RAFFIELD'S) movement in interstate commerce or the movement of Defendants' product in interstate commerce." (*State's Response in Opposition To Motion to Dismiss and Memorandum Supporting said Response*, page 8).

Except for the statute at issue, RAFFIELD would have been allowed to legally participate in, and economically benefit from the *catching and processing* of those fish. The insistence by the State that a "savings clause" in the United States Department of Commerce emergency regulation (codified at 50 CFR, Part 653) salvages the possession portion of the statute is without merit in that the application of that portion of the statute would deny a Florida fishery from benefiting from processing the fish, violating the Commerce Clause.

The State points out that recently the United States Supreme Court, in *Maine v. Taylor*, ___ U.S. ___, 106 S. Ct. 2440, 91 L.Ed. 2d 110 (1986) sustained a Commerce Clause attack on a Maine statute placing severe restrictions on "importing" baitfish. In that case the Court stated that the "Commerce Clause" cannot be read as requiring the State

of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred . . . before it acts to avoid such consequences." *Id.*, 91 L. Ed. 2d at 127. The Court reasoned that Maine had a legitimate local purpose of protecting the State's fisheries from parasites and nonnative species that may be in shipments of live baitfish.

There is no such legitimate local purpose or no similiar crisis in the instant case. The fish were legally caught, even with a federal observer on board. No further depletion of red fish resulted in those fish being transported to Florida for processing, since they had to be processed somewhere. Transportation to Florida meant more jobs for Florida citizens.

THEREFORE, the Court finds Florida Statute 370.08(3) to be unconstitutional in that it violates the Commerce Clause.

In conclusion, it is difficult for the Court to understand what legitimate purpose the State could have hoped to serve by pursuing this matter. It appears that they may have been more interested in netting the fisherman than in the netting of fish.

FURTHERMORE, it concerns the Court that for the same act one governmental agency (United States Department of Commerce) encourages by issuing a permit (#RD-001) and compliments a citizen for his participation (letter from Department of Commerce official, Andrew J. Kemmer to "Fishermans Pride" Captain, Ricky Lancaster, dated July 21, 1986), another government agency (Florida Marine Patrol) condemns that act and arrest those who participated. This is a sad state of affairs.

The court hereby grants Defendants' *Motion to Dismiss* and orders that any bond obligation relative to this case be dissolved.

DONE AND ORDERED this 25th day of September, 1986.

/s/ David L. Taunton
DAVID L. TAUNTON
GULF COUNTY JUDGE

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

PROVISION OF THE UNITED STATES CONSTITUTION INVOLVED

1.] The U. S. Constitution, Article I, Section 8[3], commonly referred to as the Commerce Clause, provides that:

Section 8. [3] [The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2.] The U. S. Constitution, Article IV, Section 2[1], commonly referred to as The Privileges and Immunities Clause, provides that:

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.

3.] The U. S. Constitution, Article VI [2], commonly referred to as The Supremacy Clause, provides that:

[2] This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

4.] The U. S. Constitution, Amendment XIV, Section 1, commonly referred to as The Privileges and Immunities Clause, The Due Process Clause, and The Equal Protection Clause, provides that:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTORY LAW INVOLVED

5.] The relevant portions of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1801, provide as follows:

(a) Findings

The Congress finds and declares the following:

* * *

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(b) Purposes

It is therefore declared to be the purposes of the Congress in this chapter –

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

* * *

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States;

(c) Policy

It is further declared to be the policy of the Congress in this chapter –

* * *

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

6.] The relevant portions of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1812, provide as follows:

Exclusive Fishery Management Authority

The United States shall exercise Exclusive Fishery Management Authority, and the manner provided for in this Chapter, over the following:

(1) all fish within the fishery conservation zone.

7.] The relevant portions of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1851, provide the following:

(a) In General

Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid necessary duplication.

8.] The relevant portion of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1852, provides as follows:

(a) Establishment

There shall be established, within 120 days after April 13, 1976, eight (8) Regional Fishery Management Councils, as follows:

(5) Gulf Council

The Gulf of Mexico Fishery Management Council shall consist of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and shall have authority over the fisheries in the Gulf of Mexico seaward of such States. The Gulf Council shall have 17 voting members, including 11 appointed by the Secretary in accordance with subsection (b)(2) of this section (at least one of whom shall be appointed from each such State).

9.] The relevant portions of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1855, provide as follows:

(e) Emergency Actions

(1) If the Secretary finds that an emergency exists involving any fishery, he may promulgate emergency regulations necessary to address the emergency, without regard to whether a fishery management plan exists for such fishery.

(2) If a Council finds that an emergency exists involving any fishery within its jurisdiction, whether or not a fishery management plan exists for such fishery –

(A) the Secretary shall promulgate emergency regulations under paragraph (1) to address the emergency if the Council, by unanimous vote of the members who are voting members, requests the taking of such action; and

(B) the Secretary may promulgate emergency regulations under paragraph (1) to address the emergency if the Council, by less than a unanimous vote, requests the taking of such action.

1856.

10.] The relevant portion of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1856, provides that:

State Jurisdiction

(3) Except as otherwise provided by paragraph (2), a State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State.

FEDERAL REGULATIONS INVOLVED

11.] The relevant portions of 50 C.F.R. §653, Docket No. 60617-6117, provide as follows:

Drum Fishery of the Gulf of Mexico

Summary:

NOAA issued an emergency interim Rule for the Management and Conservation of the Drum Fishery of the Gulf of Mexico. The Rule (1) limits the total directed net harvest of red drum from the fishery conservation zone to one million pounds, (2) establishes permit requirements and on board observer needs for vessels conducting directed net fishing for red drum, (3) specifies reporting requirements for owners or operators of vessels engaged in directed net fisheries for red drum, for spotter aircraft pilots, and for net vessels with an incidental catch of red drum, and (4) provides for closure of the red drum directed net fishery when the TDNH level has been reached. The intended effects of this Rule are to (1) recognize the concerns and efforts to the coastal states, to manage and conserve red drum and to support these efforts to the extent permitted by applicable Federal law, (2) prevent excessive taking of the resource until the Secretary of Commerce implements a Fishery Management Plan for the Drum Fishery, and (3) obtain the greatest amount of scientific information possible during the emergency period for use and preparation of a Secretarial plan.

Effective Dates:

For a period of ninety (90) days beginning 0001 hours, local time, June 25, 1986, through 2400 hours, local time, September 23, 1986, except for Section 653.4 and 653.5.

Supplementary Information:

Under Section 305(e)(1) of the Magnuson Fishery Conservation and Management Act (Magnuson Act), the Secretary of Commerce (Secretary), upon finding that an emergency exists involving any fishery, may promulgate emergency regulations deemed necessary to address that emergency. Those regulations may remain in effect for no more than ninety (90) days unless extended in accordance with Section 305(e)(1) of the Magnuson Act. The Secretary has determined that an emergency exists with regard to the red drum fishery of the Gulf of Mexico. Therefore NOAA issues this emergency interim rule implementing regulations deemed necessary to respond to the emergency.

Background:

Commercial fishing for red drum in the FCZ is conducted almost entirely with purse seines though other types of net gear may prove equally as effective. Purse seines, when deployed under the direction of spotter aircraft, have proven extremely efficient with catches of 50,000 pounds or more per set not uncommon and frequently range up to 150,000 pounds by some vessels.

Commercial net fishermen harvesting red drum in the Gulf of Mexico FCZ have a vested interest in this fishery. Because of limited information on the status of stocks; there exists a critical need for the fullest cooperation from the commercial sector to enable the acquisition of as much information as possible during the emergency period.

Regulatory Responses:

To safeguard the red drum resources from over exploitation, the Secretary is issuing this emergency interim rule. This rule limits the total directed net harvest of red drum from the FCZ to one million pounds for the 90-day effective period. This action greatly reduces the potential catch that could occur during this period and thus precludes possible excessive and destructive harvest. For example, two purse seine vessels harvested an average of 700,000 pounds of red drum monthly from January through May 1986. At this rate these two vessels could easily harvest in excess of 2.1 million pounds during a 90 day period. If all purse seine vessels actively fished during this period, their total harvest could reach 10 million pounds with proper market conditions. When the one million pound limit is reached or projected to be reached, all directed net fishing for red drum in the Gulf of Mexico FCZ will be prohibited.

This restriction results in a substantial limitation on red drum harvest. There is no credible scientific evidence to support the conclusion that more restrictive limitations in the FCZ are warranted at this time. The chosen total directed net harvest limit strikes a balance between the urgent need to conserve this valuable resource and the need to preserve the economic and social integrity of those interests, both recreational and commercial, that depend upon the resource. Information obtained during the pendency of this emergency rule will better enable preparation of a Secretarial plan to manage and conserve the resource and achieve optimum yield (OY) from the fishery.

§ 653.3 Relation to other laws.

(a) Persons affected by these regulations should be aware that other Federal and State statutes and regulations may apply to their activities.

(b) Certain responsibilities relating to data collection and enforcement may be performed by authorized State personnel under a cooperative agreement entered into by the State, the U. S. Coast Guard, and the Secretary.

(c) These regulations apply within the boundaries of any national park, monument, or marine sanctuary in the Gulf of Mexico.

(d) These regulations will not be construed to supersede any State law which prohibits the landing or possession within the jurisdiction of that State of any red drum.

§ 653.4 Permits and Fees.

(a) *Applicability.* Permits are required for all vessels fishing for red drum in the directed red drum net fishery in the FCZ. An application for a permit must be applied for by the owner or operator of such vessel on forms provided by the Regional Director. The owners and operators of vessels issued such permits must comply with the terms and conditions stated thereon.

12.] 51 Fed. Reg. 46675-02 (1986) provides in relevant part that:

* * *

The Federal Government has a responsibility to manage fisheries in the EEZ. Nevertheless, State laws would effectively nullify Federal fishing regulations in the EEZ if States could prohibit not only the landing of fish caught in State waters, but the landing of fish legally caught in the EEZ under Federal regulations.

It may become more difficult for States to enforce their landing laws if fish caught beyond State waters under a more liberal Federal regime can be landed. On the other hand, it would not ordinarily be fair, absent circumstances justifying such treatment, to apply different rules to people fishing in the EEZ based solely upon their State of citizenship. Inconsistent Federal and State regulations may legally exist in the EEZ and in State waters, but that is not usually the best way to regulate a fishery ranging over a wide geographical area. Experience in other fisheries has led to the conclusion that the best way to regulate is by Federal regulations and State regulations which are as similar as possible. When Federal regulations and State regulations are consistent, the question of conflict between Federal harvesting laws and State landing laws does not arise, the ability of each jurisdiction to enforce its laws is not diminished by problems of proving where the fish were caught. However, it is impossible to harmonize Federal law with the laws of each of the States on the Gulf of Mexico when these State laws differ significantly from each other. We will therefore continue to encourage that all the Gulf States adopt compatible regulations so that Federal and State regulations applicable to red drum could more easily be

harmonized throughout the Gulf. NOAA plans to continue to work with the States to that end.

Recognizing State conservation efforts and desiring to cooperate, NOAA decided that all landings except the incidental catch taken by gill nets, trammel nets, and purse seines should remain subject to State laws. Landings of red drum lawfully harvested in the EEZ by gill nets, trammel nets, and purse seines are exempt from State landing, possession and sales laws. Vessels using such gear must provide six hours' advance notice of landing any incidental catch of the red drum and are subject to permitting and recordkeeping requirements. Because shrimp trawl vessels are excluded from the definitions of the directed and non-directed red drum fisheries, these vessels are exempt from the permitting and reporting requirements. Additional reporting and recordkeeping requirements for dealers and processors may be imposed by the States to ensure that only legally harvested fish move through commercial channels. If, as the result of further research, a directed commercial harvest quota is ultimately established, NOAA intends to cooperate with the States so that supersession of State laws with respect to the landing of the harvest of the directed fishery can be accomplished with the minimum of disruption of laws applicable to State waters.

STATE STATUTE INVOLVED

13.] FLA. STAT. §370.08(3) provides the following:

(3) Use of purse seines, gill nets, and pound nets, etc. – No person may take food fish within or without the waters of this State with a purse seine, purse gill net, or

other net using rings or other devices on the lead line thereof through which a purse line is drawn, or pound net, or have any food fish so taken in his possession for sale or shipment.

(2)

Case No. 90-633

Supreme Court, U.S.
FILED
DEC 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

EUGENE RAFFIELD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent, the State of Florida ("Florida") arrested Petitioner Eugene Raffield ("Raffield") on July 16, 1986, for violating FLA.STAT. § 370.08(3) (1985). Raffield's employees or agents used his boat to catch over 80,000 pounds of red drum (redfish), with a purse seine, in federal waters of the Gulf of Mexico. Florida does not dispute that the fish were caught pursuant to a federal permit.[1]

The fish were landed in Louisiana, and transported by truck to Raffield's processing plant in Port St. Joe, Florida. At the processing plant, Raffield was arrested for violating the possession component of 370.08(3) [hereinafter "possession/landing law"] which provides:

> No person may take food fish within or without the waters of this state with a purse seine ... *or have any food fish so taken in his possession* for sale or shipment. [e.s.]

The possession/landing law has been codified in its contemporary form since 1953,[2] twenty-three years before passage of the Magnuson Fishery Management and Conservation Act (16 U.S.C. §§ 1801-82, hereinafter the "Magnuson Act"). The same federal emergency regulations that permitted catching the redfish expressly preserved state landing laws:

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1 Federal emergency rules imposing a one-million pound quota on commercial red drum harvest in the Gulf of Mexico took effect June 25, 1986. 51 Fed.Reg. 23551 (June 30, 1986). These rules provided for issuance of permits to harvest redfish until the quota was reached. *Id.* The fishery was closed on July 20, 1986. *See* 51 Fed.Reg. 26554 (July 24, 1986). Subsequent federal rulemaking has not allowed direct harvest of redfish since that time. Incidental commercial or recreational catch of red fish from Federal Gulf waters still "must comply with the landing and possession laws of the State where landed." *See* 50 CFR § 653.3(c) (Oct. 1, 1989).

2 *See* FLA.STAT. § 370.08(3) (1953).

§ 653.3 Relation to other laws.

* * * *

(d) These regulations will not be construed to supersede any State law which prohibits the landing or *possession* within the jurisdiction of that State of any red drum. [e.s.] [hereinafter the "savings clause"].

51 Fed.Reg., 23554 (June 30, 1986).

In this context, the questions presented for review are:

1.Whether FLA.STAT. § 370.08(3) (1985) was preempted despite express preservation of possession/landing laws by the savings clause in the emergency rules, and by the Magnuson Act [16 U.S.C. § 1856(a)(3)].

2.Whether Florida's enforcement of § 370.08(3) violates the Privileges and Immunities Clause of United States Constitution when there is no discrimination against citizens of other states.

3.Whether Florida's enforcement of § 370.08(3) violates equal protection in light of this court's specific holding to the contrary in *Skiriotis v. Florida.*

4.Whether Florida's enforcement of § 370.08(3) constitutes an impermissible burden on interstate commerce.

5.Whether Florida's enforcement of § 370.08(3) violates Raffield's due process rights.

LIST OF PARTIES

There is one other defendant to the state proceedings not shown in the caption: Raffield Fisheries, Inc.

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State

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CITATIONS TO OPINIONS AND JUDGMENTS BELOW

Florida is satisfied with Raffield's citations to the opinions below.

JURISDICTIONAL STATEMENT

Raffield seeks review of the decision by the Florida Supreme Court entered July 19, 1990. The decision resolves an interlocutory matter. Therefore the jurisdictional requirement of a "final judgment or decree" under 28 U.S.C. § 1257 is not met. This case does not fit within any exceptions to that requirement.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Florida is satisfied with Raffield's statement as to this item, except to add:

Federal Statutory Law
28 U.S.C. § 1257

Federal Regulations
51 Fed. Reg. 23551-6 (June 30, 1986)

Florida Statutes
FLA.STAT. § 370.01(12)(1985)

STATEMENT OF THE CASE

For clarity, Florida notes that Raffield has not been brought to trial. There has been no conviction.

SUMMARY OF ARGUMENT

Raffield seeks review of a decision by the Florida Supreme Court that is not a final judgment. He has not established jurisdiction in this court.

If there is jurisdiction, the questions raised by Raffield do not warrant this Court's review. The Florida Supreme Court's decision is in accord with controlling decisions by this Court and does not conflict with other State Supreme Courts on any issues of Federal law.

Florida's statute was not preempted by the Magnuson Act and the emergency red drum rules that implemented it, but was the subject of specific savings language in both. The statute does not conflict with either. The Privileges and Immunities Clause is not implicated because there is no disability forced upon non-Florida residents. The Equal Protection Clause is not violated by enforcement only in Florida based on this court's holding in *Skiriotis*. Florida's statute has at most an indirect effect on interstate commerce. Any burden is incidental to the legitimate state interest in protecting fisheries resources. Raffield's substantive due process argument was not raised below. Nevertheless, the challenged statute is reasonably related to a legitimate state objective and therefore not violative of due process. Raffield's petition for certiorari must be denied.

ARGUMENT

JURISDICTION

Raffield invokes this court's jurisdiction under 28 U.S.C. § 1257. This court, pursuant to 28 U.S.C. § 1257(3), has jurisdiction to review "final judgments or decrees" of state courts by writ of certiorari. There has been no trial, conviction or sentence; and therefore no final judgment. *Berman v. United States,* 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence."); *Flynt v. Ohio,* 451 U.S. 619 (1981) (no final judgment when no sentence has been imposed). Raffield has not established jurisdiction in this court.

Raffield admitted the facts of this case only for purposes of his motion to dismiss under FLA.R.CRIM.P. 3.190(c)(4). Given such admission, the fact that two Florida appellate courts have ruled he may be prosecuted under Florida's possession/landing law does not compel the conclusion that his trial would amount to "no more than a few formal gestures leading inexorably towards a conviction." *Mills v. Alabama,* 384 U.S. 214, 217 (1966). To convict Raffield, Florida still must prove that Raffield possessed redfish caught with a purse seine, a matter resting upon facts involving significant time and distance. It is not at all certain that Raffield's defenses to date are his only defenses, or that conviction would be an inexorable result of denying certiorari.

Raffield claims the right to possess fish in violation of a state possession/landing law that was designed to effectuate restrictions on commercial fishing gear. However, there is no federal constitutional right to fish with particular gear at a particular place or time. The absence of a fundamental constitutional right, such as freedom of speech, distinguishes this case from *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975) (reviewing state law that prohibited broad-

cast of rape victim's name, and discussing four categories in which highest state court judgment would be considered final despite remaining state court proceedings).

Unique events of this case insure that no federal constitutional issue will survive further state court proceedings. The savings clause within the long-expired[3] emergency rules was not carried forward in the permanent red drum rules.[4] Absent changes to current federal redfish rules, the factual circumstances giving rise to Raffield's claim cannot recur. Consequently this case is factually unlike *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, this Court recognized that the federal constitutional issue raised by prosecutorial withholding of exculpatory evidence would survive state proceedings. *Id.* at 217, note 1. Therefore review in absence of final judgment was deemed appropriate.

This case does not present the specter of long and complex litigation that might otherwise be avoided through a decision by this Court. *See Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) (involving liquidation of national banks and over 143 parties). This is a straightforward criminal case against one individual and his corporation.

In sum, Raffield seeks review of a non-final order that does not meet the exceptions to the finality requirement of 28 U.S.C. § 1257. If he is acquitted, the issues are moot; if not, he can seek review by this Court from the highest state court from which relief can be had. The facts of his case are unique, involving temporary (emergency) federal rules with

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3 The emergency rules were extended only through December 22, 1986. *See* 51 Fed. Reg., 34219 (Sept. 26, 1986) ("Drum Fishery of the Gulf of Mexico; Extension of Effective Date of Interim Rule").

4 *See* 50 CFR § 653.3 ("Relation to Other Laws") (October 1, 1989 ed.).

a savings clause since abandoned. Factually, there is no lingering federal question that will survive outcome of the state proceedings. In the interim, Raffield is not restrained from exercising any constitutional rights, fundamental or not, by the presence of the challenged statute. Since both the challenged statute and the federal emergency rules seek to protect redfish, there will be no erosion of federal policy if this court declines review at this time. *See Flynt v. Ohio, supra* at 622 (no erosion of federal policy by allowing Ohio to prosecute under its obscenity statute). Raffield seeks federal intervention in a misdemeanor prosecution against a single individual (himself) and his corporation. This Court should not exercise jurisdiction.

PREEMPTION

Assuming this court has jurisdiction, the central fact is that the possession component of § 370.08(3) is a "possession or landing law" under the savings clause and preamble in the emergency rules. The Florida Supreme Court expressly found such. *See Raffield v. State,* 565 So.2d 704, 705 (Fla. 1990). ("The statute at issue today manifestly is a 'State law which prohibits the landing or possession' of red drum caught with a purse seine.")

The savings clause of the emergency rules, in effect when Raffield was arrested, declares:

> These regulations will not be construed to supersede any State law which prohibits the landing or *possession* within the jurisdiction of that State of any red drum. [e.s.]

See 51 Fed. Reg., 23554 (June 30, 1986). The preamble to the emergency rules defines what would be considered a non-superseded landing law:

Relation to State Laws

> The Secretary [of Commerce] recognizes the conservation and management efforts of the coastal states in the Gulf of Mexico with regard to the red drum fishery. The Secretary desires to support those efforts through this emergency action to the maximum extent permitted under the Magnuson Act. It is the intent of the Secretary to supplement the States' efforts to conserve red drum. Therefore, the emergency rule does not supersede any State landing laws which apply to red drum. For purposes of the emergency rule, *a State landing law is a statute, regulation or ordinance which makes it unlawful to land or possess within the jurisdiction of a State any red drum.* [e.s.]

See the preamble to the emergency rules, at 51 Fed. Reg. 23553 (June 30, 1986).

FLA.STAT. § 370.08(3) (1985) clearly bans possession, in Florida, of saltwater food fish caught with purse seines. Redfish (i.e., red drum) are specifically declared to be [saltwater] "food fish" by FLA.STAT. § 370.01(12) (1985):

> (12) "Food fish" shall include... *redfish,* ... and all other fish generally used for human consumption. [e.s.]

No reasonable reading of § 370.01(12) and § 370.08(3) together can avoid the conclusion that Raffield was arrested under a non-superseded "State landing law."

Nevertheless, Raffield contends that § 370.08(3) is preempted by federal laws and regulations. A close examination of the law of pre-emption shows that the statute is not preempted. As set forth above, the emergency regulations had a specific savings clause preserving the State's landing

laws and, furthermore, the state statute would not affect the taking of the federally-imposed quota.

The Supremacy Clause prohibits states from interfering with or obstructing federal law. *Hines v. Davidowitz,* 312 U.S. 52, 57 (1940). There is, however, a presumption against preemption. *Maryland v. Louisiana,* 451 U.S. 752, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.")

Three species of pre-emption occur. First, a federal statute may explicitly express an intent to pre-empt state regulation. *Shaw v. Delta Airlines,* 463 U.S. 85, 95-96 (1983). A statute may also explicitly disavow that intent. The Magnuson Act explicitly addresses the matter of pre-emption of state laws in § 306 [16 U.S.C. § 1856], entitled "State Jurisdiction." Section 306(a)(1) explicitly confirms state jurisdiction over activities by any person in its territorial waters. Although states are barred from regulating "directly or indirectly" vessels operating outside their territorial waters, that bar does not apply to "fishing vessel(s) registered under the law of that state." § 306(a)(3). The power of states to regulate within their territorial waters and to regulate their state-registered vessels in federal waters is not pre-empted by the Magnuson Act.

Even if the Act on its face did not bar pre-emption of state fishing laws that are within its powers to enact, judicial precedents explaining the pre-emption doctrine confirm the validity of the state statute *sub judice.* If the federal statute does not confirm or disavow an intent to pre-empt state law, courts may infer the second type of pre-emption; that is, an intent to pre-empt when the federal government has

regulated so comprehensively as to "occupy the field."[5] *E.g.*, *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 713-14 (1984); *Florida Avocado Growers v. Paul*, 373 U.S. 132, 135 (1963).

There can be no doubt as to whether Magnuson Act fishery regulations "occupy the field": section 306(a)(3) of the Act explicitly disavows this suggestion. It confirms the right of states to regulate the activities of state-registered fishing vessels, even when they operate outside the states' territorial waters.[6] By express language of the Magnuson Act, Congress has determined not to "occupy the field" of fisheries regulation. Since the Department of Commerce, when

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5 Raffield's assertion that Congress intended to vest *exclusive* regulation of the fisheries resources in the United States is not borne out by the language of the Act or the legislative history. The Act preserves states' *Skiriotis* jurisdiction over state registered vessels [306(a)(3)]. The report of the Senate Committee on Commerce states:

> Within the Fishery conservation zone, the United States would exercise exclusive fishery management authority. This authority is exclusive in the sense that no other nation may regulate fishing within the zone[.]
>
> * * * *
>
> [I]t preserves the domestic breakdown of management authority between the states and federal Government which has prevailed since the founding of the republic.

See Committee on Commerce and National Ocean Policy Study, 94th Cong., 2d Sess., *A Legislative History of the Fishery Conservation and Management Act of 1976*, at pages 677-78.

6 Raffield asserts that this exception allows regulation by the states only as to "matters touching on the health, safety or welfare of the persons participating in the commercial fishing industry." [pet. at 14] This assertion has no support in the language of the Act or its history. There is no need for an exception for that type of state regulation in the Magnuson Act, because under no conceivable interpretation of the Act could it be construed to preempt such regulation. This is exclusively a fishery management law. All of its parts must be construed as related to that subject, including the state registered vessel exception.

implementing the Magnuson Act, has only the powers delegated by the Congress, it may not adopt regulations that "occupy the field" of fisheries regulation. *See Louisiana Public Service Commission v. Federal Communications Commission,* 476 U.S. 355, 369-75 (statutory limits on jurisdiction barred federal preemption, through rulemaking, of state law, since a "federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority" [*id.* at 374]). To do so would be to exceed the Department's delegated authority by overruling a statutory confirmation of state regulatory powers.

In addition, the emergency rules specifically state:

> these regulations will not be construed to supersede any state law which prohibits the landing or *possession* within the jurisdiction of that state of any red drum. [e.s.]

51 Fed.Reg., 23554 (June 30, 1986). The challenged statute was applied on land and in Florida. It was not preempted.

The third species of pre-emption bars state regulation that is repugnant to federal regulations. *Florida Avocado Growers,* 373 U.S. at 142-43. If it is physically impossible to comply with both the state and federal regulations, the state scheme must yield. This Court, in *Florida Avocado Growers,* offered the following example of physical impossibility:

> if the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content.

Id. at 143.[7] Raffield misconstrues this principle to argue that when a vessel has caught redfish with a purse seine under a federal permit, compliance with the state possession restriction is physically impossible. It is possible to comply with both the federal quota and Florida's possession/landing law by using other gear or landing and selling the fish in another state.

The pre-emption analysis does not end with the determination that compliance with both regulations is physically possible. State regulations may be preempted if they frustrate the purposes of the federal regulations. *Fidelity Federal Savings and Loan Assn. v. de la Cuesta,* 458 U.S. 141, 153 (1982). The purpose of the federal quota is to preserve the breeding stock of the fishery by preventing overfishing. Obviously, landing and possession limits do not obstruct or frustrate that purpose. Indeed, the federal regulations specifically preserve state landing and possession laws.

The essence of Raffield's argument is that the federal regulation confers a federal right to catch redfish using purse seines and that the state landing rules are an impediment to the free exercise of that right. However, this Court has continuously indicated that unless the state regulation is preempted under the principles described above, states are free to impose more stringent regulations. *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 719 (1985).

---

7 The actual situation in *Florida Avocado Growers* arose because the federal rules governing avocado harvest in Florida were based on size and dates of harvest. Avocados certified under the federal rule were prevented from entering California where the code required avocados to contain at least 8% oil. The Supreme Court held that the Florida growers could leave their crops on the trees a little longer to achieve the required 8% for shipment to California and therefore it was not physically impossible to comply with both regulations. 373 U.S. at 143.

The holding of the Florida Supreme Court on preemption is correct on its facts and does not conflict with this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), or the Rhode Island Supreme Court's decision in *State v. Sterling*, 448 A.2d 785 (R.I. 1982). Applying the *Jones* test for preemption, the challenged statute does not conflict with the federal regulation, especially in light of the savings clause. Similarly, there is no conflict with *Sterling*. There, the Rhode Island Supreme Court held there was a conflict between the federal rule and the state regulation, thereby requiring preemption. That court did *not* require preemption of state regulations by the mere existence of a fishery management plan. The Florida court properly found no conflict and no preemption.

PRIVILEGES AND IMMUNITIES

Raffield asserts his "right to fish" has been abridged by the state in violation of the Privileges and Immunities Clause. That clause was:

> designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.
>
> [and to] remov[e] from the citizens of each State the disabilities of alienage in the other States, and [to] giv[e] them equality of privilege with the citizens of those States[.]

Toomer v. Witsell, 334 U.S. 385, 395-96 (1947). In *Toomer*, a South Carolina statute was declared in violation of this

provision because it operated "to exclude non-residents and thereby create a commercial monopoly for South Carolina residents." *Id.* at 395.[8]

The statute at issue here creates no such disability. There is no discrimination against non-residents in favor of residents. Florida and non-Florida residents are subject to the law, when in possession of saltwater food fish caught with a purse seine. Conversely, any fisherman could have landed and possessed redfish, if not caught in a purse seine, in Florida.

This case presents no conflict with any precedents of this Court. It is consistent with the analysis of the privileges and immunities clause in *Toomer.* This case is also consistent with the holding in *Golden State Transit Co. v. Los Angeles,* 110 S.Ct. 444 (1989), where this Court outlined the test for determining whether an enforceable right is created by a federal statute.

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8 Raffield asserts that this Court in *Toomer* found a right to fish, which assertion forms the basis for most of the arguments set forth in his petition. The right recognized in *Toomer* was not a general right to fish free from government intrusion, but rather to do business free from the discrimination which the privileges and immunities clause was designed to prevent. Petitioner's argument that there is an unbridled right to fish would prevent regulation by the Magnuson Act or any state laws. No such right existed at common law. The Magnuson Act creates no such right. *See North Pacific Fishing Vessels Owners' Assoc. v. Sheffield,* 852 F.2d 572 (9th Cir. 1988)(table) [Note: This affirmance is followed by an unpublished opinion, which held, in an attorney's fee claim under 42 U.S.C. § 1988, that the Magnuson Act creates no right under 42 U.S.C. § 1983. *See* App. A herein.]

EQUAL PROTECTION

Raffield complains that the Florida statute denies him equal protection of the laws under the Fourteenth Amendment of the United States Constitution. This argument ignores the holding in *Skiriotis v. Florida,* 319 U.S. 69 (1940). There, this Court addressed the equal protection question raised by a Florida statute restricting the types of gear which Florida sponge fishermen could use in Florida waters or on the high seas:

> Nor is there any repugnance in the provisions of the statute to the equal protection clause of the Fourteenth Amendment. The statute applies equally to all persons within the jurisdiction of the state.

Id. at 75.[9]

Florida has a rational basis for enforcing its statute. The *Skiriotis* Court, and many afterwards, have recognized that a state's interest in preserving nearby fisheries is sufficiently strong to permit extraterritorial enforcement of its laws enacted for that purpose. *E.g. Felton v. Hodges,* 374 F.2d 337, 339 (5th Cir. 1967). *See United States v. Alaska,* 422 U.S. 184, 198-99 (1975) (recognizing "the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea"). Landing and possession limits are a rational way for the state to advance those interests. The Florida Supreme Court's holding as to equal protection does not present a conflict or a substantial question of federal law. It is squarely in line with this Court's decision in *Skiriotis.*

---

9 In *Skiriotis,* this Court also recognized the power of the States to regulate the activities of their citizens on the high seas as long as there is no conflict with acts of Congress. 313 U.S. at 77.

COMMERCE CLAUSE

Raffield asserts that FLA. STAT. § 370.08(3), is an impermissible burden on interstate commerce. The proper analysis of this question is found in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), where this Court held:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

The first question then is whether there is a legitimate local interest advanced by the local regulations. Preservation of nearby fisheries has long been recognized as a legitimate local interest. *See Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 426 (1935) (fish taken from within and without the jurisdiction of a state are indistinguishable, therefore a state law restricting manufacture of fish flour from sardines brought into the state properly effectuates the policy of the law by rendering evasion more difficult).

Having established that there is a legitimate local interest, the next question is whether the law creates a direct or indirect burden on interstate commerce. If there is any such burden resulting from this statute, it is clear that it is indirect. Preservation of the redfish breeding population is the main purpose of the law; it is not directed at impairing interstate commerce. The only burden imposed by the law is a possibility that a Florida fisherman may have to land and sell his catch in another state. In fact, Raffield did land his fish in Louisiana. Rather than selling them there, he chose to transport them to Florida in knowing violation of the challenged statute.

The burden placed on interstate commerce by FLA.STAT. § 370.08(3) is not "excessive." It is insufficient to outweigh the benefits and legitimate state objectives so as to render the statute unconstitutional. *Bayside Fish,* 297 U.S. at 425-26 (effect of statute purely incidental, indirect, and not beyond purposes of legislation).

Finally, when fish are caught and landed, they "come to rest" in the state of Florida and are subject to legitimate state regulation. As did the cotton in *Federal Compress and Warehouse Co. v. McLean,* 291 U.S. 17 (1933), the redfish here came to rest in Florida. Also, the redfish had no ascertainable destination outside Florida before shipping orders were given. As in *McLean:*

> Property thus withdrawn from transportation, *whether intrastate or interstate,* until restored to a transportation movement interstate, has often been held subject to local [regulation]. [e.s.] *Id.* at 21.

Florida's enforcement of § 370.08(3) against Raffield was valid because the redfish came to rest, and were thereby removed from interstate commerce.

DUE PROCESS

Raffield's substantive due process claim was not raised below and should not be considered at this time by this Court. *See Shelley v. Kraemer,* 334 U.S. 1, 8-9 (1947) (noting that in the predecessor action the court correctly declined to reach a constitutional issue not raised below). As set forth above, the Florida statute works no unconstitutional discrimination and is not arbitrary. Also as set forth above, the law is a reasonable way for the State to effectuate the legitimate goal of preserving fisheries resources. *See Bayside Fish* and *U.S. v. Alaska, supra.* This claim presents no substantial federal question and is without merit.

CONCLUSION

This Court is without jurisdiction for want of a final judgment under 28 U.S.C. § 1257. Raffield fails to raise a substantial federal question requiring review by this Court. The decision of the Florida Supreme Court does not conflict with any decision by this Court or any other State Supreme Court on an issue of federal law. Raffield's petition for certiorari must be denied.

Respectfully submitted,

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Case No. 90-633

IN THE

Supreme Court of the United States

October Term, 1990

EUGENE RAFFIELD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

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North Pacific Fishing Vessel Owners' Association, et al.,

Plaintiffs-Appellants,

v.

Bill Sheffield, Governor, State of Alaska, et al.,

Defendants-Appellees.

No. 87-3646

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted June 8, 1988.
Decided July 7, 1988.

D. Alaska

AFFIRMED.

[Respondent's Note: The following is excerpted from the unpublished part of the opinion.]

Appeal from the United States District Court for the District of Alaska; James M. Fitzgerald, District Judge, Presiding.

Before EUGENE A WRIGHT, FERGUSON and BRUNETTI, Circuit Judges.

The North Pacific Fishing Vessel Owners' Association (NPFVOA) and two individual named plaintiffs (collectively hereinafter "appellants") appeal the district court's denial of their motion for attorney's fees under 42 U.S.C. § 1988. Appellants claim that the district court erred in ruling that they were not entitled to attorney's fees because they had not made a cognizable claim under 42 U.S.C. § 1983. Appellants argue that they made a valid statutory claim under

the Magnuson Fishery Conservation and Management Act (Magnuson Act), as well as valid constitutional claims under the Supremacy Clause, the Commerce Clause, the Due Process and Equal Protection clauses of the Fourteenth Amendment, and under the Privileges and Immunities Clause of Article IV, section 2, and that any one of these provided a basis for a section 1983 claim.

I.

In 1978, the Secretary of Commerce, acting under the authority of the Magnuson Act (16 U.S.C. §§ 1801-1882), promulgated regulations which restricted vessels operating in Alaska's various geographic fishing areas delineated in the Act. These areas, or "Fishing Control Zones" ("FCZs"), encompassed the oceanic expanse from the Alaska's territorial boundary of three miles to a line 200 miles offshore. The relevant regulations defined certain areas to be non-exclusive. *See* 50 C.F.R. §§ 671.23, 671.24 (suspended 51 Fed.Reg. 40,027, 40,029 (1986), repealed 52 Fed.Reg. 17,577, 17,579 (1987)).

In March of 1983, the state of Alaska's Board of Fisheries adopted regulations for the 1984 Tanner crab season which designated as "super-exclusive" the same FCZS referenced in the federal regulations. Under these state regulations, anyone registered to take Tanner crab in the super-exclusive areas would not be permitted to fish or take crab in any other area. Violation of these regulations could result in potential seizure of the vessel and arrest. In addition, the state regulations placed restrictions on the number of crab pots that each vessel could use while operating in a separate area defined as the Kodiak District.

Shortly after the state adopted these regulations, the North Pacific Fishery Management Council, an advisory council to the Secretary of Commerce, considered whether the federal government should adopt the state restrictions at issue. The Council ultimately rejected the idea in September of 1983 in part because the Council found that, while unable to make a "quantitative estimate," they believed that the proposed regulations could have a disparate impact between "local" and "non-local" vessels.[1]

Just prior to the scheduled February 10 opening of the Tanner crab season, the governor's office issued a press release which stated that these new regulations would be specifically enforced. Shortly thereafter, appellants filed a complaint seeking declaratory and injunctive relief against enforcement of the state regulations. On February 9, the district court granted a temporary restraining order. That same day, the Alaska Board of Fisheries repealed the challenged regulations.

Appellants subsequently filed for attorney's fees. At a hearing on the motion, counsel for the state raised the possibility that the state might try to reenact the challenged regulations. Since such action would require appellants to go to trial on the merits of their claims—and thus possibly increase their attorney's fees—the court reserved its decision on appellants' motion for fees.

The parties later stipulated to a dismissal of the action, conditioned upon the state's agreement not to implement similar regulations in the future. Appellants then filed a supplemental motion for attorney's fees. On June 21, 1985 the district court issued an order dismissing the case,

---

1 The Council defined local vessels to be "all boats whose home port was Chignik, Sand Point or King Cove, owned by a local resident who fishes predominantly in this area."

"subject to plaintiffs' motion and supplemental motion for an award of attorney's fees, costs, and expenses, both parties having reserved the right to appeal said disposition."

The district court's original dismissal order was premised exclusively on appellants' preemption claim. None of the other constitutional claims were mentioned. On January 21, 1987, after supplemental responses had been made by both parties, the district court issued an order denying the appellants' motion for attorney's fees. The court stated that, while appellants had "prevailed on the merits," they had failed to state any cognizable section 1983 claim. The court also stated that it had relied primarily on the Supremacy Clause challenge in granting the temporary restraining order, and neither that claim nor any of appellants' other claims sufficiently supported a request for attorney's fees under section 1988.

* * * *

[II] A.

Appellants claim that they have a cause of action to enforce the Magnuson Act under section 1983 which entitles them to collect attorney's fees under section 1988. We disagree.

In *Maine v. Thiboutot,* 448 U.S. 1 (1980), the Supreme Court held that individuals may have a section 1983 cause of action against state officials for violations of federal statutes. However, two exceptions to this presumption that a section 1983 remedy exists were recently summarized by the Court as follows:

> where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.

Wright v. City of Roanoke Redevelopment & Housing Authority, [479 U.S. 418, 423] 107 S.Ct. 766, 770 (1987).

Regarding the first exception, this court has stated that where a statute's enforcement scheme is sufficiently comprehensive, an intent to foreclose private enforcement can be inferred. *Almond Hill School v. United States Department of Agriculture*, 768 F.2d 1030, 1035 (9th Cir. 1985).

The Magnuson Act provides various enforcement mechanisms, and remedies including civil fines, civil forfeiture, and criminal penalties. 16 U.S.C. §§ 1858-1860. Enforcement responsibility for the Act has been entrusted to the Secretary of Commerce and "the Secretary of the department in which the Coast Guard is operating," and their delegatees. 16 U.S.C. § 1861(a). Section 1856(b) is especially relevant to the instant case in that it addresses circumstances in which state regulation lies in direct conflict with the federal regulatory scheme. The section provides that the Secretary of Commerce may exercise preemptive powers over a state fishing regulation, inter alia, where the state action "will substantially and adversely affect the carrying out of [the federal] fishery management plan...." 16 U.S.C. § 1856(b)(1)(B).

We hold that by enacting this comprehensive remedial scheme, Congress intended to foreclose private enforcement of the Act through section 1983.

Even if we did not find that appellants' cause of action was barred by the Act's comprehensive remedial scheme, however, appellants would still be barred by the second exception to the presumption of section 1983 availability because the Magnuson Act does not create enforceable rights in favor of appellants. Appellants contend that the Magnuson Act gives them a "right to fish." To have a federal right cognizable under section 1983, appellants must be members of the class for whose particular benefit the Magnuson Act was

enacted. *See Boatowners and Tenants Association v. Port of Seattle,* 716 F.2d 669, 672 (9th Cir. 1983) (reiterating the *Cort v. Ash,* 422 U.S. 66 (1975), analysis for implying private rights of action from statutes). "The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra Club,* 451 U.S. 287, 294 (1981). While appellants are beneficiaries of the Act because of the Act's restrictions on foreign fleets, we find nothing in the statute which demonstrates that Congress intended to confer federal rights on them. *Cf. Boatowner,* 716 F.2d at 673 ("There is no indication that the statute was intended to benefit specially the pleasure craft owners ... nor that Congress intended to confer federal rights on [them]."). Rather, the Act was passed to protect the domestic fisheries from depletion. *See Washington State Charterboat Association v. Baldridge,* 702 F.2d 820, 823-4 (9th Cir. 1983), *cert. denied,* 464 U.S. 1053 (1984), and therefore does not confer rights upon appellants.[2]

Having concluded that the statutory enforcement provisions are exhaustive and that the Magnuson Act does not confer "enforceable rights" upon appellants, it is clear that the district court did not err in concluding that appellants do not have a section 1983 claim under this theory.

* * * *

---

2 Appellants claim that Congress' intent to create a privately enforceable right through the Magnuson Act is demonstrated in the Act's requirement that federal regulations "not discriminate between residents of different states," 16 U.S.C. 1851(a)(4), and through the Act's introduction, articulating the Congressional policy that implementation of the Act be responsive to the needs of U.S. citizens and not unnecessarily impede legitimate uses of the high seas. 16 U.S.C. 1801(c)(2)-(3). Viewed in context, those sections confer neither substantive rights, nor an enforcement right.

(3)

Supreme Court, U.S.
FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-633

In The

Supreme Court of the United States

October Term, 1990

EUGENE RAFFIELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

JURISDICTION

It is the Petitioner's position that the Respondent misconstrues not only the jurisdictional limitations of this Court, but also, the purpose behind a Petition for Writ of Certiorari. The Respondents state that the decision of the Florida Supreme Court is a non-final Order that does not meet the requirements of 28 U.S.C. §1257. What the Respondent fails to realize is that the decision of the Florida Supreme Court is, in fact, a final decision with regard to the Federal Constitutional issues raised in the Motion to Dismiss at the trial court level. If, in fact, the Petitioner is tried criminally for a violation of Section 370.08(3) of the Florida Statutes, the Constitutional issues (addressed by the Florida Supreme Court) are incapable of being raised again.

Rule 10 of the Rules of the Supreme Court of the United States, gives a great deal of guidance with regard to the reasons which will be considered in granting a Writ of Certiorari. In this case, Rule 10.1(b) and Rule 10.1(c) indicate the reasons that the present Writ should be granted:

> (b) When a state court of last resort has decided a Federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, or has decided a Federal question in a way that conflicts with applicable decisions of this Court.

Due to the fact that the Florida Supreme Court did, in fact, decide very important questions of Federal law in a manner conflicting with decisions of this Court and decisions of other State Courts of last resort, (cited in the Petition for Writ of Certiorari) and, due to the fact that the Florida Supreme Court's decision with regard to these Federal questions is not reviewable except by this Court, the jurisdiction of this Court to grant the Petition is firmly established.

PRE-EMPTION

The Respondent persists in deeming Section 370.08 (3) of the Florida Statutes, a "possession or landing law" related to red drum when it is neither. The Florida Statute is *simply* a law against the use of a purse seine to catch food fish. A landing law seeks to prohibit seagoing vessels from unloading enumerated species of fish, plants or animals on lands within the jurisdiction of the state seeking to prohibit such landings. The State statute in question is not a possession law or landing law relating to red drum; it is, rather, an attempt to restrict the federally approved *method* of taking food fish in the United States Exclusive Economic Zone. The Respondent points to the savings clause of the Federal Rule and allege that the Florida statute is a non-superseded "State landing law" related to the conservation and management of red drum. The Respondent seeks to avoid the fact that the State law simply attempts to prohibit the use of fishing equipment which the Federal Rule allows.

The Florida statute does not prohibit the landing and/or possession of any "red drum". If it did then the Preamble to the Rule would arguably allow the State law to be enforced. The Florida statute is, plainly and simply, a purse seine law which prohibits persons from taking or possessing *food fish* taken by purse seine. The Federal Rule allowed all United States commercial fishermen to use a purse seine to harvest red drum in the United States Exclusive Economic Zone. Arguing that red drum can be included within the very wide scope of the prohibitions as contained in the purse seine law, and that the law is, therefore, a "red drum possession law", is disingenuous. The Florida statute is certainly not a law prohibiting the landing or possession of red drum as contemplated by the exception to the Federal Regulation. *See* the Preamble to the Emergency Rules, at 51 Fed. Reg. 23,553 (June 30, 1986).

The State Attorney's Office commented (in dismissing the criminal action against several of the Petitioner's co-defendants) that the "Statute requires proof beyond a reasonable doubt, that the offender knew the food fish so possessed for sale or shipment were taken by purse seine or other prohibited means". The constitutional

issue to be addressed by this Court is centered around the possession of food fish *legally* taken by purse seine under Federal law with such possession being criminally prosecuted under the State purse seine law. The State officials went on to say that:

> We cannot meet this burden of proof as to the employees of Raffield Fisheries any more than we can meet this burden of proof against a food store, convenience store or fast food establishment. See *Appendix to Petition*, Page 19.

Apparently the State Attorney realized that all sardines are harvested by purse seine and, with such knowledge, every Florida sardine consumer violates the possession provision of Section 370.08(3) of the Florida Statutes.

In their brief, the Respondent sets out the various ways in which pre-emption of State law can occur. Petitioner's arguments concerning the manner in which pre-emption has, in fact, occurred are adequately set out in the Petition. It does seem interesting, however, that the Respondent completely ignores one of the major purposes of the Magnuson Act, which is to "achieve and maintain, on a continuing basis, the optimum yield from each fishery . . . ". 16 U.S.C. §1801(b)(3) and 16 U.S.C. §1801(b)(4) (1986). Can Florida citizens or persons aboard Florida registered vessels (which is it?) be prohibited from taking part in achieving the optimum yield in a Federal fishery or be prohibited from participating in reaching a Federal quota in a particular fishery? Such a result cannot be judicially sanctioned.

In the United States District Court for the Northern District of Florida, (Tallahassee Division), the State of Florida filed suit against Malcolm Baldrige, Secretary of Commerce, NOAA, the National Marine Fisheries Service and the Regional Director of the National Marine Fisheries Service. The Federal Defendants counter-claimed in May 1983 and on January 2, 1985, the parties filed a "Stipulated Settlement Agreement for Dismissal With Prejudice". The case, *State of Florida v. Baldrige*, No. 83-7071, Slip Op. (N.D. Fla. 1985) was dismissed with prejudice on January 7, 1985. In the Stipulated Settlement Agreement, the State of Florida was "allowed" to continue direct or indirect extraterritorial regulation of state registered vessels where there was no fishery management plan in effect. The United States and the State of Florida went

further in their Stipulation by agreeing on Federal pre-emption of state regulation of fishing equipment and/or methods. The State and United States agreed that State attempts to regulate the catching of food fish by purse seine, where such purse seine fishing was conducted *in compliance with Federal regulations* was, and would be, ***illegal!*** Specifically, the State of Florida and the United States agreed that:

> Where such mackerel fishing is conducted in the FCZ in compliance with Federal regulations, Fla. Stat. 370.08(3) *may not be enforced as to fishing in the FCZ or fish caught* in the FCZ. (emphasis supplied) *See*, paragraph 2, Stipulated Settlement Agreement for Dismissal with Prejudice.

In *State of Florida v. Baldrige*, No. 83-7071, Slip Op. (N.D. Fla. 1985) the United States counterclaimed for Declaratory Judgment alleging that the Federal regulations (which contemplated fishing equipment and methods [purse seine] used to catch food fish) under the Magnuson Act, invalidated Florida state fishery laws which directly or indirectly regulated fishing outside the state's waters. *See*, paragraph 1 in United States' Counterclaim. The United States took a *strong* position against the state's attempt to regulate federal fishing by vessels that were not registered in Florida. *See*, page 12, paragraph 12, of the United States' Counterclaim. The United States' position was summed up under paragraph 14 of the Counterclaim as follows:

> If it remains in effect, Florida Statute 370.08(3) will prevent the Department of Commerce and the National Oceanic and Atmospheric Administration from carrying out the Congressional mandates expressed in the Magnuson Act. Those mandates include managing a fishery unit throughout its range, achieving optimum yield from a fishery, basing management measures on the best available scientific information, promoting efficiency, and allocating fishing privileges in a fair and equitable manner. Interference by the Defendants with fishermen conducting activities sanctioned under the FMP hampers NOAA in performing its duties under the Act.

Copies of the Court's Order of Dismissal, the United States' Answer and Counterclaim, and the Stipulated Settlement Agreement are printed in their entirety in the Appendix hereto.

State of Florida v. Baldrige, closely mirrors another case which was filed in the United States District Court for the Southern District of Florida: *Southeastern Fisheries Association, Inc. v. Captain Livings*, No. 83-524-CIV-SMA, Slip Op. (S.D. Fla. 1983). In his Order granting a temporary restraining order against the State of Florida's proposed interference with purse seine fishing conducted in the Fishery Conservation Zone, Judge Aronovitz pointed out that the "state registered vessel" exception under the Magnuson Act and the "type of state regulation the Act allows" *could not include* the ban on the use of purse seines that the State Defendants were attempting to enforce. A significant part of Judge Aronovitz' Order had to do with the Petitioners Equal Protection and Commerce Clause arguments in the case at bar. Judge Aronovitz stated:

> Under Plaintiff's interpretation of Section 1856(a), boats from states other than Florida would be able to leave from Florida ports, enter the FCZ, use purse seines to make their catches, return to Florida ports, and unload their catches while Florida registered vessels would be prevented from doing any of the above. At oral argument, counsel for the State informed the Court that boats registered in other states would likewise be prohibited from the use of purse seines in violation of Section 370.08(3). However, the state's application of Section 370.08(3) to out-of-state vessels would constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause. On the other hand, *it is neither fair nor equitable to allow boats registered in other states to reap the benefits the Act opens to them while Florida vessels are prohibited from the same conduct.* (emphasis added)

This Petition for Writ of Certiorari is the very last chance for Petitioner to assert his determinative Constitutional Rights violations.

In *Bateman v. Gardner* 716 F. Supp. 595 (S.D. Fla. 1989), the Court was faced with some of the same argument as contained in the Petition and Brief in Opposition now before this Honorable Court. The facts in *Bateman v. Gardner* were remarkably similar to the facts in the case at bar. Chief Judge James Lawrence King

found that Florida's continued enforcement of its shrimp management measures (in light of the existing Federal shrimp management plan) denied the Plaintiff, a Florida shrimp fisherman, equal protection under the United States Constitution. He then held that the Florida statutory scheme had been pre-empted by the Magnuson Act and the Federal Shrimp Plan. The decision in the *Bateman* case has been appealed to the Eleventh Circuit Court of Appeals with oral arguments having been heard on September 24, 1990. A decision is pending. A copy of the decision handed down in the *Bateman* case at the trial court level is reprinted in its entirety in the Appendix hereto.

The Respondent, as part of the pre-emption argument, seems to assume that the Petitioner's argument is that a vessel catching red drum with a purse seine cannot comply with the State possession restriction. The Respondent's argument based on this assumption misrepresents the Petitioner's position. Indeed, the Petitioner states that it *would be* possible to comply with the provisions of Section 370.08(3) of the Florida Statutes if a person in the Petitioner's position were to use vessels registered in states other than Florida, were to employ crew members other than Florida citizens, and land, process, and sell the fish in a State other than Florida. As was pointed out in the original Petition, this is an unconstitutional burden on interstate commerce and it adversely affects and discriminates against Florida's commercial fishermen and fish processors. See *Petition*, Pages 26 and 27.

The Respondent concludes the pre-emption argument by stating that the decision of the Florida Supreme Court does not conflict with the decision in *State v. Sterling*, 448 A.2d 785 (R.I. 1982). The response to this is simple: the savings clause did not allow an exception for State laws restricting the use of equipment (purse seine) allowed by Federal law. The Respondent skirts the fact that there is an inherent conflict between the Statute challenged and the Federal Regulation. The Federal Regulations *allowed* the taking of red drum by purse seine and the State statute disallows the taking of *any* food fish by purse seine. This is not merely a matter of semantics, it is an existing black and white conflict!

PRIVILEGES AND IMMUNITIES

The Respondent's Privilege and Immunities argument raises a very interesting question about the Respondent's basic position. The Respondent relies on the "State registered vessel exception", which is found in §306(a)(3) of the Magnuson Act [16 U.S.C. §1856], for the proposition that the State is empowered to, directly or indirectly, regulate the Petitioner's fishing activities in Federal waters. They further cite the holding in *Skiriotes v. Florida*, 313 U.S. 69 (1941) for the proposition that a State can regulate the extraterritorial conduct of its citizens when there is a *rational basis* for such enforcement and *no conflict* with Federal law. It is curious to see the Respondent then argue that *all* United States citizens (not just Florida citizens) are subject to the provisions of Section 370.08(3) of the Florida Statutes when in possession of food fish caught with a purse seine. If the Respondent agrees that the provisions of Section 370.08(3) of the Florida Statutes can only be enforced when dealing with a Florida registered vessel (or a Florida citizen), then how could they possibly apply the State purse seine prohibition to a Non-Florida resident legally taking red drum in Federal waters? Such reasoning is frightening in light of the constitutional principles upon which this Country is founded. The fact is that the State has no power to regulate the Federally approved manner in which United State's fishermen take fish while in Federal waters.

It is true that the case of *Toomer v. Witsell*, 334 U.S. 385 (1947), dealt with a situation where a State discriminated against non-residents. In the instant situation we have Florida citizens and commercial fishermen being discriminated against on the basis of their residence; it is, however, no less a violation of a Federal privilege and immunity which has been granted by the United States Constitution and Federal Fishery Management Laws and Regulations. The Respondent's indication that there is no "right to fish" on the part of United States citizens ignores the obvious; there has always been a right to fish, and the Magnuson Act recognizes this fact; it is only through the passage of laws that these rights have become regulated.

EQUAL PROTECTION

The Respondent argues that the Petitioner's equal protection arguments "ignore the holding in *Skiriotis (Sic) v. Florida*, 319 (Sic) U.S. 69 (1940) (Sic)". Once again, the Respondent fails to point out that the holding in *Skiriotes v. Florida*, 313 U.S. 69 (1941) – the correct spelling and citation – is limited to situations where there is "no conflict with Federal law". The Respondent relies on some of the language contained in *Skiriotes* and subsequent cases such as the *United States v. Alaska*, 422. U.S. 184 (1975) to attempt to provide justification for prosecuting the Petitioner. When this Court recognized "the special interest that a coastal state has in the preservation of the living resources in the high seas *adjacent to its territorial sea*" (emphasis added) *Id* at 198-99, this Court probably had no idea that the State of Florida, some fifteen (15) years later, would be attempting to have it determined that the waters off of the Louisiana coast are "adjacent to its territorial sea".

The Florida Supreme Court in its decision below stated that the extraterritorial enforcement of Section 370.08(3) of the Florida Statutes "serves a legitimate local purpose" and the statute "is directed at this *evil* [use of purse seine] in the only possible way: it eliminates Florida as a market for food fish obtained by using purse seines". (emphasis added) *See* App. 5, 6 to the Petition for Writ of Certiorari. Applying the reasoning of the Florida Supreme Court, a person catching red drum off of the coast of California and then transporting them by truck from California to Port St. Joe, Florida, would be subject to prosecution in the State of Florida for a violation of Section 370.08(3) of the Florida Statutes. Such a result has nothing to do with a "rational basis" for such regulation or a "legitimate local purpose" nor does it have anything to do with the "adjacent territorial sea", much less red drum conservation or management!

COMMERCE CLAUSE

In the Respondent's Commerce Clause argument, there is a continuation of reliance on the preposterous position that

enforcement of the purse seine law is an attempt to protect a "legitimate local public interest". The Respondent seeks to prohibit the Petitioner and all like him from using a purse seine (a Federally sanctioned means) to take a Federal fishery resource from the waters off of the coast of Louisiana. To what lengths is the State of Florida willing to go to protect its "legitimate local interest" in prohibiting the "evil" purse seine? Off of the coast of Alabama, Mississippi, Louisiana, or Texas? Off of the coast of California? What about Africa? The State Supreme Court's assessment of the power of the Florida purse seine law is disturbing at best. As has been stated previously, the enforcement of Section 370.08(3) of the Florida Statutes, does nothing to protect the red drum population in Federal waters. The one million pounds of red drum would have been taken with or without the Petitioner's participation! The only thing which the enforcement of the State statute accomplishes is a discrimination against Florida commercial fishermen in their legal harvest and processing of Federal fishery resources.

Finally, the Respondent states that "the only burden imposed by the law is a possibility that a Florida fisherman may have to land and sell his catch in another state". Once again, we are forced to ask how many interpretations of this particular law can the State of Florida make? Section 370.08(3) of the Florida Statutes, attempts to make it illegal for any Florida fishermen to take any food fish by purse seine in Federal waters *regardless* of the state in which that Florida fisherman chooses to land them. Are we now to understand that the State of Florida will not enforce the taking (as opposed to possession) portion of Section 370.08(3) of the Florida Statutes, if the Florida fisherman simply does not bring the fish back into the State of Florida? The State seems to indicate that there was no violation at the point that Mr. Raffield's Florida registered vessel, while in Federal waters south of Louisiana, caught "food fish" with his purse seine. If the purse seine law was not violated at that point, when did the legal Federal harvest of food fish, in this case, red drum become illegal? The Petitioner complied with all provisions

of the Federal Rule even to the point of having a Federal observer on board his Florida registered vessel.

CONCLUSION

Allowing the Respondent to call a state law prohibiting use of a federally approved fishing method a *landing law* and/or *possession law* for red drum violates due process, federal privileges and immunities, equal protection and common sense. It discriminates on the basis of citizenship or state of incorporation. No United States citizen should ever be prosecuted under such a strained and convoluted construction of an invalid state law. This Court cannot now turn its back on such a basic fundamental error.

It is high time for this Court to make a clear, comprehensive decision with regard to the Magnuson Act and the Federal fishing rights of United States Commercial fishermen. The basic Constitutional issues are now before this Court. The Federal fishery resources of the United States Exclusive Economic Zone should either be open to all United States' fishermen or closed to all! It *is* that simple!

Respectfully submitted,

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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION: FLORIDA DEPARTMENT OF NATURAL RESOURCES Plaintiffs, v. MALCOLM BALDRIGE, as Secretary of Commerce; THE UNITED STATES DEPARTMENT OF COMMERCE; DR. JOHN V. BYRNE, as Administrator of the National Oceanographic and Atmospheric Administration; WILLIAM G. GORDON, as Director of the National Marine Fisheries Services; and JACK BRAWNER, Regional Director of the National Marine Fisheries Service, Southeast Region; Defendants.	)	CIVIL ACTION NO. 83-7071

ORDER

(Filed Jan 7 1985)

Pursuant to the foregoing Stipulation, the Plaintiffs' Complaint and the Defendants' Counterclaim are hereby dismissed with prejudice, with each party to bear its own costs and attorney's fees.

January 7, 1985

/s/ William Stafford
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA; FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION: FLORIDA DEPARTMENT OF NATURAL RESOURCES Plaintiffs, v. MALCOLM BALDRIGE, as Secretary of Commerce; THE UNITED STATES DEPARTMENT OF COMMERCE; DR. JOHN V. BYRNE, as Administrator of the National Oceanographic and Atmospheric Administration; WILLIAM G. GORDON, as Director of the National Marine Fisheries Services; and JACK BRAWNER, Regional Director of the National Marine Fisheries Service, Southeast Region; Defendants.	)	CIVIL ACTION NO. 83-7071

STIPULATED SETTLEMENT AGREEMENT FOR DISMISSAL WITH PREJUDICE

(Filed Jan 2 1985)

The plaintiffs, State of Florida, et al., and the defendants, Malcolm Baldrige, Secretary of Commerce, et al., hereby stipulate under Fed. R. Civ. Pro. 41(a)(2) to a dismissal with prejudice and final settlement of all claims

and counterclaims in this matter, upon all parties' agreement to the following:

1. All parties agree that under Section 306(a) of the Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1856(a), where a vessel is registered under the laws of a state such as Florida, the registering state may directly or indirectly regulate that vessel's fishing in the Federal Fishery Conservation Zone (FCZ), absent a conflict with the lawful exercise of federal fisheries authority and/or jurisdiction under the Magnuson Act.

2. The parties agree that Fla. Stat. 370.08(3) (ban of purse seines to capture food fish) conflicts with federal regulations under the Magnuson Act to the extent that the state law attempts directly and/or indirectly to prohibit the use of purse seines to take king and Spanish mackerel in the FCZ. Where such mackerel fishing is conducted in the FCZ in compliance with federal regulations, Fla. Stat. 370.08(3) may not be enforced as to fishing in the FCZ or fish caught in the FCZ.

3. Each side will bear its own costs and attorneys' fees in this matter.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA; FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION: FLORIDA DEPARTMENT OF NATURAL RESOURCES Plaintiffs, v. MALCOLM BALDRIGE, as Secretary of Commerce; THE UNITED STATES DEPARTMENT OF COMMERCE; DR. JOHN V. BYRNE, as Administrator of the National Oceanic and Atmospheric Administration; WILLIAM G. GORDON, as Director of the National Marine Fisheries Services; and JACK BRAWNER, Regional Director of the National Marine Fisheries Service, Southeast Region; Defendants.	CIVIL ACTION NO. 83-7071

ANSWER AND COUNTERCLAIM

(Filed May 16 1985)

Defendants Malcolm Baldrige, the United States Department of Commerce, Dr. John V. Byrne, William Gordon, and Jack Brawner, through their undersigned counsel, answer the plaintiffs' complaint herein as follows:

COUNTERCLAIM

The United States of America, by its undersigned attorneys, and on behalf of the Department of Commerce and the National Oceanic and Atmospheric Administration, counterclaims against the plaintiffs as follows:

1. This counterclaim is for declaratory judgment under 28 U.S.C. 2201. It seeks a declaratory judgment that the federal regulations regarding management of the coastal migratory pelagic resources (mackerel fisheries) under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* (the Act), invalidate conflicting Florida state fishery law which directly and/or indirectly regulates fishing outside the state's waters.

2. This Court has jurisdiction over defendants' counterclaim under 28 U.S.C. 1345.

3. The Act provides for management of fisheries in the fishery conservation zone (FCZ). The FCZ begins at the seaward boundary of each coastal state and extends to a line 200 miles from the baseline of the United States. 16 U.S.C. 1811.

4. Among the purposes of the Act are promotion of domestic commercial fishing and achievement of optimum yield from each fishery, in accordance with seven national standards. 16 U.S.C. 1801(b)(3) and (4), 1851(a).

5. The mechanism for carrying out these purposes is a fishery management plan (FMP), developed by Regional Fishery Management Councils, and implemented with federal regulations promulgated by the Secretary of Commerce. 16 U.S.C. 1853-55.

6. The Gulf of Mexico and South Atlantic Fishery Management Councils jointly prepared an FMP for the Coastal Migratory Pelagic Resources.

7. The Secretary of Commerce approved the FMP and promulgated regulations implementing it on February 4, 1983 (48 Fed. Reg. 5270; 50 CFR Part 642).

8. The federal regulations, at 50 CFR 642.21, allow harvest by purse seines of 400,000 pounds of king mackerel and 300,000 pounds of Spanish mackerel in the FCZ of the Gulf of Mexico, and the same amounts in the South Atlantic FCZ. Section 642.24 requires purse-seine operators to send a letter of intent to the Regional Director of the National Marine Fisheries Service (NMFS), to notify the Center Director (NMFS) 48 hours before each trip, to report catch information within 15 hours after unloading, and to accommodate observers.

9. Florida Statute 370.08 provides:

> No person may take food fish within or without the waters of this state with a purse seine, purse gill net, or other net using rings or other devices on the lead line thereof, through which a purse line is drawn, or pound net, or have any food fish so taken in his possession for sale or shipment. The provisions of this section shall not apply to shrimp nets or to pound nets or purse seines when used for the taking of tuna or menhaden fish only. Any person violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

10. Section 642.21 of the federal regulations conflicts with Florida Statute 370.08(3) in that the federal regulations allow purse-seining in federal waters, while the Florida law purports

to prohibit purse-seining for mackerels, in federal as well as state waters, by citizens of any state.

11. Under the Supremacy Clause of the United States Constitution (Art. 6, Cl. 2), Florida Statute 370.08(3) is invalid to the extent that it conflicts with section 642.21.

12. Under Section 306(a) of the Magnuson Act, 16 U.S.C. 1856(a), Florida Statute 370.08(3) is also invalid to the extent that it purports to regulate fishing by vessels that are not registered in Florida.

13. Both the federal regulation and the State law are currently in effect, so that the public is subject to conflicting requirements.

14. If it remains in effect, Florida Statute 370.08(3) will prevent the Department of Commerce and the National Oceanic and Atmospheric Administration from carrying out the Congressional mandates expressed in the Magnuson Act. Those mandates include managing a fishery unit throughout its range, achieving optimum yield from a fishery, basing management measures on the best available scientific information, promoting efficiency, and allocating fishing privileges in a fair and equitable manner. Interference by the defendants with fishermen conducting activities sanctioned under the FMP hampers NOAA in performing its duties under the Act.

WHEREFORE, defendants respectfully request the Court to dismiss plaintiffs' complaint and to enter judgment for defendants upon their counterclaim.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FREEMAN R. BATEMAN,

Plaintiff,

v.

TOM GARDNER, individually, and as Executive Director of The Florida Dept. of Natural Resources, et al.,

Defendants.
_____/

CASE NO. 87-10062-CIV-KING

FINAL SUMMARY JUDGMENT

The court today faces several problems that have resulted from the apparently admirable efforts of Florida and the United States to protect an area of incredible natural beauty, the water surrounding the Dry Tortugas. To preserve the unique sea life in this area, both Florida and the federal government have enacted statutes and regulations that manage fishing in the region. The overall effect of this cooperative effort has been confusion, especially with respect to shrimping. The federal government bars shrimping in certain areas and allows it in others, while Florida prohibits its own shrimpers from shrimping in the entire area.

The plaintiff, a Florida resident and Florida licensed fisherman, brings this action under the Civil Rights Act and the United States Constitution, alleging that he is a victim of unfair discrimination. The recurring statement of the plaintiff's claim is a violation of the equal protection clause. The plaintiff notes that the Florida statute regulating shrimping prohibits Florida shrimpers from a

certain area, but does not prohibit shrimpers registered in other states. The plaintiff seeks a declaration that the metes and bounds description of the shrimping area protected by Florida violates the United States Constitution, and directly conflicts with the Magnuson Act, 16 U.S.C. § 1801, *et seq.* and the Gulf of Mexico Shrimp Fishery Management Plan, 50 C.F.R. 658, *et seq.* After considering the arguments of counsel on the cross-motions for summary judgment, the court finds the plaintiff's contentions are meritorious.

PROCEDURAL HISTORY

In August of 1987, the plaintiff commenced this action seeking declaratory and injunctive relief against the state officials in charge of enforcing *Fla. Stat. Ann.* § 370.1512, the Florida statute regulating shrimping in the Dry Tortugas. Shortly thereafter, both the plaintiff and the Florida officials cross moved for summary judgment.

After a hearing on the motions for summary judgment, on October 5, 1988, this court preliminarily determined that the plaintiff was being denied equal protection of law as a result of the combined operation of *Fla. Stat. Ann.* § 370.152 and 16 U.S.C. § 1856(a)(3), a key provision of the Magnuson Fisheries Act. The court ordered that the Attorney General of the United States be notified pursuant to 28 U.S.C. § 2403(a) because the plaintiff was making a constitutional challenge to an act of Congress.

On November 4, 1988, the United States sought intervention as a party plaintiff. The government sought to uphold the constitutionality of 16 U.S.C. § 1856(a)(3), and

they contended that no equal protection violation occurred. The government argued that any constitutional challenge to the Florida statute is obviated by the fact that a federal statute preempted the state statute.

All the parties agree that no genuine issue of material fact exists, and, thus, this case can be decided as a matter of law. The court has reviewed memoranda in support of the motions for summary judgment and after reviewing the relevant statutory framework, the court grants the plaintiff's motion for summary judgment.

STATUTORY FRAMEWORK

In 1976, Congress enacted the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* The Act grants the federal government exclusive fishery management authority within the "Exclusive Economic Zone" ("EEZ"). 16 U.S.C. §§1801(b)(1), 1811(a). Presidential proclamation 5030, dated March 10, 1983, established the EEZ. The EEZ is a zone or border which extends from the outer boundary of each state's territorial waters to a line two-hundred miles off-shore. *See Proclamation* no. 5030, 3 C.F.R. 22-23 (1983 compilation). The territorial waters of each state are not a part of the EEZ.

The Magnuson Act provides that the states cannot regulate, directly or indirectly, any fishing vessel outside their respective territorial borders "unless the vessel is registered under the law of that state." 16 U.S.C. § 1856(a)(3). Prior to the enactment of the Magnuson Act, a state could regulate its state registered vessels and state citizens while fishing in what is now the EEZ pursuant to

a line of Supreme Court cases culminating in *Skiriotes v. Florida*, 313 U.S. 69 (1941).

In 1957, prior to the passage of the Magnuson Act, the Florida Legislature enacted *Fla. Stat. Ann.* § 370.151 for the conservation of the supply of shrimp. The state sets out an area of shrimp beds off the coast of the Florida Keys, known as "Tortugas Shrimp Bed," where shrimp trolling is prohibited. Much of this area is beyond the territorial limits of Florida. In its filings before this court, Florida acknowledges that it has no authority under the Magnuson Act to enforce *Fla. Stat. Ann.* § 370.151 against non-Floridians outside the state's territorial waters.

In 1981, the United States Secretary of Commerce implemented the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, as promulgated in 50 C.F.R. part 658. In recognition of the importance of protecting shrimp nursery beds, the management plan has set aside an area in the Gulf EEZ near the Florida Keys in which fishing is generally closed to all shrimp fisherman. 50 C.F.R. § 658.22. This area, known as the "Tortugas Shrimp Sanctuary," is entirely outside the territorial limits of the state of Florida.

The shrimp beds protected by 50 C.F.R. § 658.22 and *Fla. Stat. Ann.* § 370.151 substantially overlap. Nonetheless, a portion of the state-created "Tortugas Shrimp Bed," lying outside the territorial waters of the state of Florida and within the EEZ, is not included with the boundaries of the federally-created "Tortugas Shrimp Sanctuary." In this area, which is in dispute here, federal law permits shrimping, but the application of the Florida statute prohibits Floridian fisherman from doing so.

DISCUSSION

For two reason, the court finds that the defendant's application of *Fla. Stat. Ann.* § 370.151 is unconstitutional in part. Specifically, both the equal protection and supremacy clauses require that a limited part of this Florida statute be struck down.

The court specifically notes that the impetus for the filing of this action was discriminatory impact. The Florida Legislature desired to prohibit shrimping in this region. The legislature first prohibited all shrimpers from the state's own waters. The legislature, however, did not stop its prohibition here. The legislature used discretion given to them by the Magnuson Act and prohibited its own shrimpers form the federal area. The net effect of the Florida legislature's action was discrimination against its own citizens, for only they were prohibited from portions of the federal area. The Florida legislature's action in prohibiting its own shrimpers from the federal waters violated the equal protection clause. Moreover, the Florida legislature offered no reason for discriminating against its own citizens in favor of out of state shrimpers. The legislature did not have to prohibit Florida shrimpers from this area. Its decision to do so, however, violated the equal protection clause.

The operation of the supremacy clause also corrects this discrimination. The United States argues that the federal Fishery Management Plan for the shrimp Fishery of the Gulf of Mexico, as promulgated by the Secretary of Commerce, 50 C.F.R. Part 658, preempts *Fla. Stat.* § 370.151(2) insofar as the Florida statute prohibits the plaintiff from shrimping in the disputed area. The United

States asserts that under preemption principles, the court can resolve the present controversy. Specifically, the federal government notes that preemption of the Florida statute as it applies to shrimping in the disputed area eliminates the unequal treatment of persons from different states, the problem which is of the greatest concern to this court.

Pursuant to the Supremacy Clause of the Constitution, Art. VI, cl. 2, the laws of the United States, including both federal statutes and federal regulations properly promulgated pursuant to statutory authorization, take precedence over state laws. *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories*, 471 U.S. 707, 714 (1985). Preemption of state law by federal law can occur in several ways, including as a result of a conflict between federal state law. *Id.* at 713-14; *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145, 1150-1151 (1988). Such a conflict occurs when it is impossible to comply with both state and federal law, or when the state law stands as an obstacle to accomplishment of congressional purposes. *Schneidewind*, 108 S.Ct. at 1150-52.

In the present case, *Fla. Stat.* § 370.151(2) conflicts with the federal Gulf Shrimp Plan as promulgated by the Secretary of Commerce. Under the federal regulation, the plaintiff may take shrimp in the disputed area, while under the state statute, he may not. *See State v. Sterling*, 448 A.2d 785 (R.I. 1982) (state fishing law conflicts with federal Magnuson regulation where federal regulation permits larger flounder take than does state law). Moreover, one purpose behind the promulgation of federal Magnuson regulation was to promote domestic commercial fishing. 16 U.S.C. § 1801(b)(3). The Florida statute

stands as an obstacle to the accomplishment of this purpose by precluding Florida fisherman from participating in commercial shrimp fishing in the disputed area. Under preemption principles, this conflict must be resolved in favor of the enforcement of federal law. Accordingly, the court

ORDERS AND ADJUDGES as follows:

1. *Florida Stat. Ann.* § 370.151(2) violates the equal protection clause of the U.S. Constitution insofar as it restricts only Florida shrimpers from federal waters.

2. 50 C.F.R. Part 658 preempts § 370.151(2) insofar as *Fla. Stat. Ann.* § 370.151(2) prohibits shrimping where the federal regulations allow it.

3. The defendants are enjoined from enforcing *Fla. Stat. Ann.* § 370.151(2) in a manner that violates the equal protection clause or conflicts with the applicable federal regulations.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 11th day of July 1989.

/s/ JAMES LAWRENCE KING
JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF
FLORIDA

sar

cc: David Paul Horan, Esq.
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